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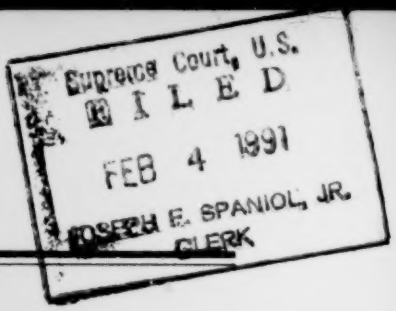

No. 90-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PAUL CASPARI, Superintendent,
Missouri Eastern Correctional Center,
and
WILLIAM L. WEBSTER,
Attorney General of the State of Missouri,
Petitioners,

VS.

DAVID E. WALTON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

I.

WHETHER FEDERAL CIRCUIT COURTS OF APPEALS DECISIONS, WHICH WERE DECIDED BEFORE *TEAGUE v. LANE*, 489 U.S. 288 (1989), CAN BE SAID, FOR RETROACTIVITY PURPOSES, TO "DICTATE" A RESULT IN A STATE COURT THAT IS NOT BOUND BY THOSE DECISIONS.

II.

WHETHER A FOURTEENTH AMENDMENT EQUAL PROTECTION CLAIM BASED UPON THE SELECTION OF A JURY IS COGNIZABLE IN A FEDERAL HABEAS CORPUS PROCEEDING WHEN SUCH A CLAIM HAS NO BEARING ON THE FACTUAL GUILT OR INNOCENCE OF THE CRIMINAL DEFENDANT OR ON THE EVIDENCE INTRODUCED DURING TRIAL AND WHEN THE GRANTING OF A WRIT OF HABEAS CORPUS WOULD NOT HAVE ANY DETERRENT EFFECT ON THE PROSECUTING ATTORNEY WHO ALLEGEDLY IMPROPERLY SELECTED THE JURY.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Jurisdictional Statement	1
Statement of the Case	2
Argument	
I. Federal Circuit Courts of Appeals decisions, which were decided before *Teague v. Lane*, 489 U.S. 288 (1989), cannot, for retroactivity purposes, "dictate" a result in a state court that is not bound by those decisions	4
II. A jury selection claim based on an alleged Fourteenth Amendment equal protection violation should not be cognizable in a federal habeas corpus proceeding because such a claim has no bearing on the factual guilt or innocence of the criminal defendant or on the evidence introduced during trial and because the deterrent effect of such a remedy on prosecution attorneys is lost	10
Conclusion	13
Appendix	A-1

TABLE OF AUTHORITIES

	Page
Cases:	
Allen v. Hardy, 478 U.S. 255 (1986)	5,7, 11,12
Batson v. Kentucky, 476 U.S. 79 (1986)	5,7,12
Berry v. Phelps, 819 F.2d 511 (5th Cir. 1987)	8
Bruner v. Perini, 875 F.2d 531 (6th Cir.), *cert. denied*, 110 S.Ct. 334 (1989)	9-10
Butler v. McKellar, 110 S.Ct. 1212 (1990)	7,8,9
Caldwell v. Mississippi, 472 U.S. 320 (1985)	7
Collins v. Lockhart, 754 F.2d 258 (8th Cir.), *cert. denied*, 474 U.S. 1013 (1985)	8
Duckworth v. Eagan, 109 S.Ct. 2875 (1989)	11,12
Futrell v. State, 667 S.W.2d 404 (Mo. banc 1984)	6,7
Garrett v. Morris, 815 F.2d 509 (8th Cir.), *cert. denied*, 484 U.S. 898 (1987)	*passim*
Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985)	8
Lockhart v. McCree, 476 U.S. 162 (1986)	8
Nevius v. State, 101 Nev. 238, 699 P.2d 1053 (1985)	7,8,9
Penry v. Lynaugh, 109 S.Ct. 2934 (1989)	8
Rose v. Mitchell, 443 U.S. 545 (1979)	13
Saffle v. Parks, 110 S.Ct. 1257 (1990)	8
Sawyer v. Smith, 110 S.Ct. 2822 (1990)	7,8
State v. Kelly, 753 S.W.2d 71 (Mo. App., S.D. 1988)	6,7

State v. Kenley, 693 S.W.2d 79 (Mo. banc 1985), *cert. denied*, 475 U.S. 1098 (1986) 6,7

State v. Walton, 703 S.W.2d 540 (Mo. App., E.D. 1985) 5,10,12

Stone v. Powell, 428 U.S. 465 (1976) 11

Swain v. Alabama, 380 U.S. 202 (1965) 5,10

Teague v. Lane, 489 U.S. 288 (1989) ..... *passim*

United States v. Danzey, 476 F. Supp. 1065 (E.D.N.Y. 1979), *aff'd*, 620 F.2d 286 (2d Cir.), *cert. denied*, 449 U.S. 870 (1980) 7,9

United States v. Green, 626 F.2d 75 (8th Cir.), *cert. denied*, 449 U.S. 878 (1980) 4,5,6,7

Walton v. Caspari, 916 F.2d 1352 (8th Cir. 1990) ..... *passim*

Weathersby v. Morris, 708 F.2d 1493 (9th Cir. 1983), *cert. denied*, 464 U.S. 1046 (1984) ..... *passim*

Constitutional Provisions, Statutes & Rules:

U.S. Const. Amend IV 11

U.S. Const. Amend XIV 4,5,11, 12,13

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eighth Circuit affirming the judgment granting the petition for writ of habeas corpus is reported at 916 F.2d 1352 (8th Cir. 1990) (A-2). The Judgment and Order of the District Court is not reported but is included in the Appendix (A-19 - A-20).

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eighth Circuit issued its Opinion on October 16, 1990 (A-2). Petitioners' timely petition for

rehearing or rehearing *en banc* was denied on December 6, 1990 (A-1). Pursuant to Supreme Court Rule 13, the present petition for a writ of certiorari was required to be filed within ninety days of the denial of rehearing. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

1. The Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, ...

2. Section One of the Fourteenth Amendment to the United States Constitution:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondent, David E. Walton, is currently incarcerated in the Missouri Eastern Correctional Center located in Pacific, Missouri, pursuant to the sentence and judgment of the Circuit Court of the City of St. Louis, Missouri. Respondent was found guilty, after a trial by jury, of one count of first-degree robbery, one count of first-degree tampering and armed criminal action. The facts surrounding respondent's criminal activity were succinctly articulated by the Missouri Court of Appeals, Eastern District in its opinion from respondent's direct appeal.

> On January 2, 1984, at approximately 1:45 p.m., the victim parked his car in the parking lot of a drugstore at the intersection

> of Manchester and McCausland in the City of St. Louis. He exited and locked the car, and prepared to cross Manchester Road. As he did so, a black male, later identified as co-defendant Sidney Hamilton, came out of a bus shelter, took a gun out of a paper bag, and ordered victim to surrender his money and car keys. Another black male, later identified as defendant, then left the shelter, took the keys, and started victim's car. Victim gave his money to Hamilton as ordered, but refused an order to enter the car and walked away. He observed defendant and Hamilton drive his car to the East on Manchester, then called the police.
>
> He described the car and the two men to the police dispatcher, who apparently put out a bulletin on the police radio concerning the crime. Two police officers spotted a car matching the description given by [victim], being driven by two black males who also matched the description given by [victim], in the area of Kingshighway and Oakland. The car was stopped and the occupants were arrested. Victim was taken to the scene of the arrest, where he identified the two men as his assailants. A Swiss Army knife usually kept in the glove department of victim's car, money and a gun were found on the occupants upon their arrest.

State v. Walton, 703 S.W.2d 540, 540-541 (Mo. App., E.D. 1985) (A-61).

After respondent's conviction was affirmed, *id.*, he filed, on August 17, 1987, a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Missouri (A-55). On March 6, 1989, United States District Judge Edward L. Filippine conditionally granted respondent's petition for a writ of habeas corpus (A-19 - A-20).

Petitioners filed a timely notice of appeal. The United States Court of Appeals for the Eighth Circuit affirmed the judgment of the District Court (A-2). *Walton v. Caspari*, 916 F.2d 1352 (8th Cir. 1990). Petitioners' petition for rehearing or rehearing *en banc* was denied (A-1). This petition for a writ of certiorari ensues.

ARGUMENT

I.

FEDERAL CIRCUIT COURTS OF APPEALS DECISIONS, WHICH WERE DECIDED BEFORE *TEAGUE v. LANE*, 489 U.S. 288 (1989), CANNOT, FOR RETROACTIVITY PURPOSES, "DICTATE" A RESULT IN A STATE COURT THAT IS NOT BOUND BY THOSE DECISIONS.

On October 16, 1990, the United States Court of Appeals for the Eighth Circuit affirmed the District Court judgment granting habeas corpus relief to respondent.

In this case, the record indicates that the prosecuting attorney had used all 14 of his peremptory challenges to exclude 14 of the 15 black venirepersons from service on respondent's petit jury. *Walton v. Caspari*, 916 F.2d 1352, 1354 (8th Cir. 1990). The resulting jury of 12 consisted of only white members.[1] The Court of Appeals affirmed the District Court's ruling that this action constituted a violation of respondent's Fourteenth Amendment right to equal protection. *Id.* at 1354-1355.

In so ruling, however, the Court of Appeals has violated this Court's mandate of *Teague v. Lane*, 489 U.S. 288 (1989) (*Teague*). The appellate court incorrectly found that Missouri courts are bound to follow the cases of *United States v. Greene*, 626 F.2d 75 (8th Cir.), *cert. denied*, 449 U.S. 876 (1980) (*Greene*); *Weathersby v. Morris*, 708 F.2d 1493 (9th Cir. 1983), *cert. denied*, 464 U.S. 1046 (1984) (*Weathersby*); and *Garrett v. Morris*, 815 F.2d 509 (8th Cir.), *cert. denied*, 484 U.S. 898 (1987) (*Garrett*).

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[1] The remaining black venireperson was selected as an alternate in the case but did not participate during deliberations. *Walton v. Caspari*, 916 F.2d at 1354, n.2.

At the time respondent's criminal proceeding became final in the Missouri state court system,[2] jury selection issues presenting a challenge based on the Equal Protection Clause of the United States Constitution were controlled by this Court's opinion in *Swain v. Alabama*, 380 U.S. 202 (1965). In fact, the Missouri Court of Appeals referred to the holding in *Swain* when deciding respondent's direct appeal. *State v. Walton*, 703 S.W.2d 540, 542 (Mo. App., E.D. 1985).

Under *Swain*, there is no equal protection violation in respondent's criminal proceeding. Respondent failed to prove systematic exclusion of African-Americans on a case-by-case basis by the prosecutor. Respondent referred the trial court only to the peremptory challenges used by the prosecutor in this case to support his equal protection claim. It was only through the additional (and arguably incorrect) holdings of *Garrett*, *Weathersby* and *Greene*, that the Court of Appeals was able to invalidate respondent's conviction. *Walton v. Caspari*, 916 F.2d at 1358-1360.[3] The court noted, "[w]e are persuaded that precedent existing at the time of Walton's direct appeal required the Missouri Court of Appeals to *examine the prosecutor's reasons* for the exercise of his peremptory challenges once he volunteered his reasons for doing so." *Id.* at 1360 (emphasis added). The Eighth Circuit also stated, "[w]e believe that the precedents of *Swain*, *Greene*, and *Weathersby* dictated that the Missouri Court of Appeals examine the

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[2] As the Court of Appeals correctly noted, respondent's conviction was final on April 19, 1986, and, accordingly, the opinion of *Batson v. Kentucky*, 476 U.S. 79 (1986), would not apply. *Walton v. Caspari*, 916 F.2d at 1358, n.8.

[3] Under *Swain*, the prosecutor is presumed to have exercised his challenges "to obtain a fair and impartial jury to try the case before the court." *Swain v. Alabama*, 380 U.S. at 222; *see also Allen v. Hardy*, 478 U.S. 255, 258 (1986) (per curiam). This Court, in *Swain*, specifically stated that "we *cannot* hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in *any given case*." *Swain*, 380 U.S. at 222 (emphasis added). In *Greene*, *Garrett* and *Weathersby*, the courts of appeals have improperly eviscerated the presumption of *Swain*. Essentially, the courts held that if the prosecutor placed the reasons for his strikes on the record, the burden shifts to the government to *disprove* systematic exclusion. That logic is *not* within the holding of *Swain* and is a "new rule" of law.

prosecutor's reasons for the exercise of peremptory challenges once he stated them on the record." *Id.*

This Court should grant certiorari in this case to correct the Eighth Circuit's incorrect application of *Teague v. Lane, supra.* It is apparent that the Circuit Courts of Appeals need additional guidance in applying *Teague* to state court convictions which are on collateral attack in the federal court system. This case presents a situation where the United States Court of Appeals has rendered a decision inapposite to *Teague, supra.* Supreme Court Rule 10.1(c). This case also presents a significant question of constitutional law that should be answered by this Court, to wit, can a constitutional rule articulated only by a Court of Appeals decision "dictate" a result in a state court not bound by those decisions? Supreme Court Rule 10.1(c).

The Court of Appeals was incorrect in holding that precedent existed at the time of respondent's direct appeal that would "dictate" a result in the Missouri state courts within the meaning of *Teague.* The cases of *Greene, Weathersby* and *Garrett*[4] would not and do not dictate such a result in the Missouri state-court system. As the Missouri Supreme Court has stated, "[w]hile unquestionably meriting respect, rulings of the Eighth Circuit Court of Appeals are not generally binding on Missouri state courts . . .." *Futrell v. State*, 667 S.W.2d 404, 407 (Mo. banc 1984); *see State v. Kenley*, 693 S.W.2d 79, 82 (Mo. banc 1985), *cert. denied*, 475 U.S. 1098 (1986), ("[the Missouri state courts] are bound by the United States Supreme Court. We need not follow lower federal courts."); *State v. Kelly*, 753 S.W.2d 71, 72 (Mo. App., S.D. 1988) ("[w]ith all due respect to the lower federal courts, Missouri courts are not ordinarily bound by the decisions of the Eighth Circuit Court of Appeals"). Of course, the same theory would apply to opinions from sister federal and state jurisdictions such as the Court of Appeals for the Ninth Circuit wherein *Weathersby* was decided.

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[4] It must be noted that *Garrett* was decided on April 3, 1987, almost a full year after respondent's conviction became final in Missouri. *See Garrett*, 815 F.2d at 509. Accordingly, *Garrett* itself cannot be said to have "dictated" a result in Missouri with respect to respondent's conviction.

In fact, the rationales of *Weathersby* and *Garrett* have been questioned. In *Nevius v. State*, 101 Nev. 238, 699 P.2d 1053, 1059 (1985), the Supreme Court of Nevada, a state in the Ninth Circuit, determined that it would not follow the Ninth Circuit *Weathersby* opinion without additional guidance from this Court. *Id.* at n.3; *cf. United States v. Danzey*, 476 F. Supp. 1065 (E.D.N.Y. 1979), *aff'd*, 620 F.2d 286 (2d Cir.), *cert. denied*, 449 U.S. 878 (1980) (where the Eastern District of New York properly followed *Swain* and refused to review the prosecuting attorney's reasons for his peremptory strikes although they were volunteered). Certainly, a result from one jurisdiction that has been questioned by other jurisdictions would not "dictate" a result in yet another, still different jurisdiction. The validity of *Garrett, Greene* and *Weathersby* as federal constitutional law is "susceptible to debate among reasonable minds." *Butler v. McKellar*, 110 S.Ct. 1212, 1217 (1990).

In *Sawyer v. Smith*, 110 S.Ct. 2822 (1990), this Court gave further guidance as to the meaning of "dictate," as the term was used in *Teague*. The Court discussed the fact that although several state and federal courts had invalidated prosecutorial statements like those found prohibitive in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), the federal constitutional rule was not announced until this Court decided *Caldwell*. *Sawyer v. Smith*, 110 S.Ct. at 2829-2830. In the same vain, the specific application of the Equal Protection Clause which led to the alleged constitutional violation found to invalidate respondent's conviction, *i.e.* reviewing the prosecuting attorney's explanations for the exercise of peremptory challenges in a specific case, was not announced until this Court's decision in *Batson v. Kentucky*, 476 U.S. 79 (1986). *Batson* is a "new rule" under the analysis of *Teague*. *See Teague v. Lane*, 489 U.S. at 295; *cf. Allen v. Hardy*, 478 U.S. at 258. *Batson*, of course, does *not* apply to respondent's case. *Walton v. Caspari*, 916 F.2d at 1358, n.8.

The fact that federal courts of appeals may have decided issues similar to this Court's *Batson* holding does not "dictate" a result in Missouri. *State v. Kenley, supra; Futrell v. State, supra; State v. Kelly, supra; cf. Sawyer v. Smith*, 110 S.Ct. at 2829-2830. In fact, this Court

has implied that in order to "dictate" a result, the prior rule of law must have been articulated in an opinion from this Court. *See Saffle v. Parks*, 110 S.Ct. 1257, 1259 (1990) (the principle petitioner urges "is not dictated by *our* prior cases . . ." (emphasis added)); *cf. Sawyer v. Smith*, 110 S.Ct. at 2829-2830. It was this theory that the Nevada Supreme Court relied on in *Nevius*, 699 P.2d at 1059, n.3. The Nevada court declined to follow a lower federal court without the rule having been characterized by this Court. *Id.* This conflict between the Nevada Supreme Court and the Eighth and Ninth Circuit Courts of Appeals should be resolved. Supreme Court Rule 10.1(a). The grant of certiorari in this case would provide an opportunity for this Court to resolve that conflict.[5] The opinions of *Weathersby* and *Garrett* constitute "new law" that could not be applied retroactively under *Teague*. *Weathersby* and *Garrett* were decided without being subjected to the analysis of *Teague*.

A case announces a "new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Teague v. Lane*, 489 U.S. at 301. "Put differently, and, indeed, more meaningfully for the majority of cases, a decision announces a new rule ' "if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." ' " *Butler v. McKellar*, 110 S.Ct. at 1216, *quoting, Penry v. Lynaugh*, 109 S.Ct. 2934, 2944 (1989), *quoting, Teague*, 489 U.S. at 301 (emphasis Court's).

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[5]Much like this case, the Eighth Circuit has recently decided habeas corpus cases that other courts have refused to follow. In *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), *cert. denied*, 474 U.S. 1013 (1985), the court determined that an aggravating circumstance submitted in the defendant's case violated the Eighth and Fourteenth Amendments. *Id.* at 262-265. This rationale, based on similar aggravating circumstances in other states, has been expressly rejected. *Berry v. Phelps*, 819 F.2d 511, 516-517 (5th Cir. 1987), and cases cited therein. Another example of this phenomenon would involve the Eighth Circuit's decision in *Grigsby v. Mabry*, 758 F.2d 226 (8th Cir. 1985). Of course, this Court reversed that holding. *Lockhart v. McCree*, 476 U.S. 162 (1986). It would appear that this Court's holding in *Teague* was meant to eliminate these types of conflicts in federal habeas corpus cases. Such a conflict will continue to exist, however, if the Court of Appeals' opinion is allowed to stand.

> The "new rule" principle therefore validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions.
>
> * * *
>
> But the fact that a court says that its decision is within the "logical compass" of an earlier decision, or indeed that it is "controlled" by a prior decision, is not conclusive for purposes of deciding whether the current decision is a "new rule" under *Teague*. Courts frequently view their decision as being "controlled" or "governed" by prior opinions even when aware of reasonable contrary conclusions reached by other courts. In *Roberson*, for instance, the court found *Edwards* controlling but acknowledged a significant difference of opinion on the part of several lower courts that had considered the question previously. . . . That the outcome in *Roberson* was susceptible to debate among reasonable minds is evidenced further by the differing positions taken by the judges of the Court of Appeals for the Fourth and Seventh Circuits noted previously. It would not have been an illogical or even a grudging application of *Edwards* to decided that it did not extent to the facts of *Roberson*. We hold, therefore, that *Roberson* announces a "new rule."

Butler v. McKellar, 110 S.Ct. at 1217-1218. In light of this Court's holding in *Butler v. McKellar*, it is easy to see that the holdings of *Weathersby* and *Garrett* are "susceptible to debate among reasonable minds." *Butler v. McKellar*, 110 S.Ct. at 1217. The Ninth Circuit, in *Weathersby*, went so far as to state that their opinion "presents a situation distinguishable from *Swain*." *Weathersby*, 708 F.2d at 1496[1]. The court also cited, in footnote 2, the Eastern District of New York's opinion in *United States v. Danzey, supra*, which provided a different holding in the same situation. *Weathersby*, 708 F.2d at 1496, n.2. This difference of reasonable minds is further evidenced by the Nevada Supreme Court's rejection of *Weathersby* in *Nevius, supra*.

If *Weathersby* were to be scrutinized under *Teague*, the case would be decided differently. *Cf. Bruner v. Perini*, 875 F.2d 531 (6th Cir.),

cert. denied, 110 S.Ct. 334 (1989) (the Sixth Circuit declined to apply a prior decision of that court because the prior precedent was decided before *Teague* and would constitute new law if considered under the analysis of *Teague*). *Id.* at 534. Under *Teague*, if the Ninth Circuit found that the situation was "distinguishable from *Swain*," *Weathersby*, 708 F.2d at 1496, the rule could not be applied in a case on collateral review. *Teague*, 489 U.S. at 310. In that light, it should be obvious that *Weathersby* could not, for the purposes of a *Teague*-retroactivity analysis, "dictate" a result in a state court. Of course, *Garrett*, which relied on *Weathersby*, would also be decided differently.

Based only on *Swain*, then, respondent's conviction must be affirmed. Respondent has not shown a systematic exclusion of black venirepersons "in [the circuit], in case after case, whatever the circumstances, whatever the crime and whoever the defendant or victim may be . . .." *Swain v. Alabama*, 380 U.S. at 223. *See State v. Walton*, 703 S.W.2d at 541-542.

This Court should grant certiorari in this case to correct the Eighth Circuit's misapplication of *Teague* and to further define what is meant by the term "dictate" in the retroactivity analysis of *Teague* and its progeny.

II.

A JURY SELECTION CLAIM BASED ON AN ALLEGED FOURTEENTH AMENDMENT EQUAL PROTECTION VIOLATION SHOULD NOT BE COGNIZABLE IN A FEDERAL HABEAS CORPUS PROCEEDING BECAUSE SUCH A CLAIM HAS NO BEARING ON THE FACTUAL GUILT OR INNOCENCE OF THE CRIMINAL DEFENDANT OR ON THE EVIDENCE INTRODUCED DURING TRIAL AND BECAUSE THE DETERRENT EFFECT OF SUCH A REMEDY ON PROSECUTING ATTORNEYS IS LOST.

Respondent David Walton, a prior and persistent criminal offender as defined under Missouri law, was convicted in this case, on competent evidence, in July of 1984. Nearly five years later in March of 1989, a United States District Judge conditionally granted respondent's peti-

tion for a writ of habeas corpus on a jury selection issue (A-19 - A-20). The United States Court of Appeals for the Eighth Circuit affirmed. *Walton v. Caspari*, 916 F.2d 1352 (8th Cir. 1990).

This Court should grant certiorari and reverse the Court of Appeals' judgment on the basis that a jury selection claim based upon an alleged Fourteenth Amendment equal protection violation should not be cognizable in a federal habeas corpus proceeding. This Court should hold that when a criminal defendant has a full and fair opportunity to present this jury-selection issue, on its merits, in a state-court proceeding, consideration of such a claim should be barred from review in a federal habeas corpus proceeding. Such an answer to that important federal question, Supreme Court Rule 10.1(c), would be analogous to the decision in *Stone v. Powell*, 428 U.S. 465 (1976) and would comport with the holding of *Allen v. Hardy*, 478 U.S. 255 (1986).

In *Stone*, this Court held that claims alleging a Fourth Amendment violation were not cognizable in a federal habeas corpus petition provided petitioner had a full and fair opportunity in state court to litigate the claim on its merits. *Stone v. Powell*, 428 U.S. at 486. The *Stone* Court based its holding on the principle that the Fourth Amendment exclusionary rule is a judicially-created remedy designed to promote "sensitivity [by law enforcement officers] to constitutional values through its deterrent effect." *Duckworth v. Eagan*, 109 S.Ct. 2875, 2882 (1989) (O'Connor, J., concurring). However, the *Stone* Court reasoned, in the context of federal habeas corpus, that the exclusionary rule had only marginal deterrent effect while the effect of the application of the rule was to offend time-honored notions of federalism and finality. *See, Duckworth v. Eagan, supra*, 109 S.Ct. at 2882-2883. The *Stone* Court concluded that by the time habeas litigation commenced, the finality interest outweighed any deterrent value the Fourth Amendment exclusionary rule might have and, accordingly, refused to consider petitioner's Fourth Amendment claim. *Stone v. Powell, supra.*

The same theory applies in this case. Petitioners submit that this Court should apply the rule of *Stone v. Powell*, in a jury selection context, to the case at bar. Like *Stone*, this case involves the application of a rule

designed to deter certain conduct of law enforcement officers—in this case, the application of the Equal Protection Clause to bar the prosecutor's use of peremptory challenges in a discriminatory manner. Like *Stone*, respondent in this case had a full and fair opportunity to litigate this claim on its merits in the state court. In fact, the Eighth Circuit determined that the Missouri Court of Appeals considered an equal protection claim in deciding respondent's direct appeal. *Walton v. Caspari*, 916 F.2d at 1356, *citing*, *State v. Walton*, 703 S.W.2d at 541-542. Like *Stone*, the application of the Equal Protection Clause in this case would result in a dubious quantum of deterrence as it would come years after respondent's conviction. In essence, the granting of a writ of habeas corpus in this situation "strike[s] like lightning" and has no "appreciable" beneficial effect. *Duckworth v. Eagan*, 109 S.Ct. at 2884 (O'Connor, J., concurring).

In *Allen v. Hardy*, *supra*, this Court determined that the new rule of constitutional law created in *Batson v. Kentucky*, 476 U.S. 79 (1986) (a rule involving a jury selection claim based on the Equal Protection Clause) would not be applied "retroactively on collateral review of convictions that became final before [the] opinion [in *Batson*] was announced." *Allen v. Hardy*, 478 U.S. at 258. This Court determined that retroactive application of the *Batson* rule on collateral review of final convictions would "seriously disrupt the administration of justice." *Id.* at 260. Although petitioners are not concerned with the retroactive application of *Batson* itself, *see Walton v. Caspari*, 916 F.2d at 1358, n.8, the theory that application of a jury selection issue on collateral review would seriously disrupt the administration of justice certainly applies. This Fourteenth Amendment jury selection claim did not affect the evidence introduced during respondent's trial. The same evidence would be used to convicted the respondent no matter what the composition of his jury was. Although the selection of a jury "may have some bearing on the truthfinding function of a criminal trial," *Allen v. Hardy*, 478 U.S. at 259, that factor can be outweighed by such concerns as finality and federalism. *Id.* at 259-261; *cf. Duckworth v. Eagan*, 109 S.Ct. at 2882-2883 (O'Connor, J., concurring).

Weighing the deterrent effect of the rule from *Swain* with the important principles of federalsim and finality in the criminal law, this Court should hold that a jury selection claim based upon an alleged Fourteenth Amendment equal protection violation is not cognizable in a federal habeas corpus proceeding. *See Rose v. Mitchell*, 443 U.S. 545, 583 (1979) (Powell and Rehnquist, JJ., concurring in judgment). Respondent's conviction and sentence should be reinstated.

CONCLUSION

Petitioners respectfully request that the petition for a writ of certiorari be granted and that the judgment of the United States Court of Appeals for the Eighth Circuit be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

TABLE OF CONTENTS

A. The December 6, 1990 Order denying the petition for rehearing A-1

B. The October 16, 1990 Opinion of the United States Court of Appeals for the Eighth Circuit A-2

C. The March 6, 1989 Judgment of the United States District Court for the Eastern District of Missouri A-19

D. The March 6, 1989 Order of the United States District Court for the Eastern District of Missouri A-20

E. Supplemental Objections to Magistrate's Report and Recommendation, filed on November 25, 1988 ..... A-21

F. Objections to Magistrate's Report and Recommendation, filed on November 22, 1988 ..... A-23

G. The November 10, 1988 Report and Recommendation of United States Magistrate A-32

H. The April 13, 1988 Memorandum and Order of the United States District Court for the Eastern District of Missouri A-44

I. The December 18, 1987 Report and Recommendation of United States Magistrate A-49

J. The Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 ..... A-55

K. The December 17, 1985 Opinion of the Missouri Court of Appeals, Eastern District A-61

L. An Excerpt from the Transcript created from the original criminal trial A-67

M. An Affidavit from former Assistant Circuit Attorney David M. Minnick A-77

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-1487EM

David E. Walton,

Appellee,

vs.

Paul Caspari and
William L. Webster,

Appellants.

Order Denying Petition for Rehearing
With Suggestion for Rehearing En Banc

Appellant's petition for rehearing with suggestion for rehearing en banc has been considered by the court and is denied.

Rehearing by the panel is also denied.

December 6, 1990

Order Entered at the Direction of the Court:
/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-1487

David E. Walton,

Appellee,

v.

Paul Caspari, and William L. Webster,*

Appellants.

Appeal from the United States
District Court for the
Eastern District of Missouri

Submitted: February 14, 1990
Filed: October 16, 1990

Before McMILLIAN and FAGG, Circuit Judges, and STROM,** District Judge.

McMILLIAN, Circuit Judge.

The State of Missouri appeals from a final order entered in the United States District Court [1] for the Eastern District of Missouri con-

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* Paul Caspari succeeded Myrna Trickey as superintendent of the Missouri Eastern Correctional Center during the pendency of this appeal. Accordingly, we substitute Paul Caspari for Myrna Trickey. *See* Fed. R. Civ. P. 25(d); Fed. R. App. P. 43. Attorney General William L. Webster is a proper party respondent, *see* 28 U.S.C. § 2254 Rule 2(b), and has submitted briefs and argued this action on appeal. We also join the Attorney General as a party respondent.

** The Honorable Lyle E. Strom, Chief Judge, United States District Court for the District of Nebraska, sitting by designation.

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[1] The Honorable Edward L. Filippine, Chief Judge, United States District Court for the Eastern District of Missouri.

ditionally granting David E. Walton's petition for a writ of habeas corpus. *Walton v. Trickey*, No. 87-1510-C(2) (E.D. Mo. Mar. 6, 1989) (order). For reversal, the state argues that the district court erred in (1) finding that Walton had not committed procedural default, (2) applying retroactively *Garrett v. Morris*, 815 F.2d 509 (8th Cir.) (*Garrett*), *cert. denied*, 484 U.S. 898 (1987), and (3) making factual findings on disputed issues of fact without a hearing. For the reasons discussed below, we affirm the order of the district court.

I.

In 1984 Walton, who is African-American, was charged with first degree robbery, first degree tampering, and armed criminal action in the Circuit Court of St. Louis, Missouri. During the course of jury selection, the prosecutor used all 14 peremptory challenges to exclude 14 of the 15 African-American venirepersons. Walton moved for a mistrial and a new trial based on the prosecutor's discriminatory use of peremptory challenges to exclude the African-American venirepersons. Although he was not required to do so, the prosecutor volunteered the reasons he struck the African-American venirepersons. The state trial court denied Walton's motion. Walton and co-defendant Sidney Hamilton (also African-American) were convicted on all counts by an all-white jury.[2] Walton was sentenced as an habitual offender to 15 years on the robbery count, 10 years on the tampering count, and 5 years on the armed criminal action count.[3]

On direct appeal, Walton contended that the prosecutor's exercise of peremptory challenges violated his sixth amendment right to a jury selected from a fair cross-section of the community. *See Lockhart v. McCree*, 476 U.S. 162 (1986); *Taylor v. Louisiana*, 419 U.S. 522 (1975).[4] The Missouri Court of Appeals affirmed the conviction,

[2]The only African-American venireperson not excluded by the prosecutor served as an alternate but did not participate in deliberations.

[3]The robbery and tampering sentences are concurrent, and the sentence for armed criminal action is consecutive to the other sentences.

[4] In *Holland v. Illinois*, 110 S. Ct. 803, 806-07 (1990), the Supreme Court held that the sixth amendment fair cross-section requirement applied to the venire but not the petit jury.

holding that Walton had not sustained his burden under *State v. Hurley*, 680 S.W.2d 209 (Mo. Ct. App. 1984), and *Swain v. Alabama*, 380 U.S. 202 (1965) (*Swain*), of showing systematic exclusion in violation of the equal protection clause. *State v. Walton*, 703 S.W.2d 540, 542 (Mo. Ct. App. 1985) (*Walton*). The Missouri Supreme Court denied Walton's motion to transfer on February 18, 1986. On April 30, 1986, the United States Supreme Court decided *Batson v. Kentucky*, 476 U.S. 79, 95-96 (1986) (*Batson*), which partially overruled *Swain* by holding that an equal protection violation could be established based on the prosecutor's discriminatory exercise of peremptory challenges in a single case. Walton subsequently filed a motion to recall mandate based on *Batson*, but the motion was summarily denied.

Walton filed the instant petition for a writ of habeas corpus in federal district court on August 17, 1987, alleging that the prosecutor's exercise of peremptory challenges to exclude African-American venirepersons violated his sixth amendment right to an impartial jury and his fourteenth amendment right to equal protection of the laws. The district court referred the matter to a magistrate[5] pursuant to 28 U.S.C. § 636(b). On December 18, 1987, the magistrate concluded that Walton had exhausted his state remedies, but had failed to show systematic exclusion as required by *Swain*, and that there was no sixth amendment exception to the equal protection analysis of *Swain*. *Walton v. Trickey*, No. 87-1510-C(2) (Dec. 18, 1987) (report and recommendation). On April 13, 1988, the district court adopted the magistrate's findings on the exhaustion and sixth amendment issues, but remanded the fourteenth amendment equal protection claim for further consideration in light of this court's decision in *Garrett*. On November 10, 1988, the magistrate concluded that because *Garrett* did not establish a "new rule" but was merely a logical extension of *Swain*, *Garrett* should be applied retroactively to Walton's conviction. Slip op. at 7-9 (Nov. 10, 1988) (report and recommendation following remand) (hereinafter report). The magistrate found that Walton had established a violation of his equal protection rights under *Garrett*, 815 F.2d at 513, which held that *Swain*'s presumption of lawfulness in the exercise

[5]The Honorable Carol E. Jackson, United States Magistrate for the Eastern District of Missouri.

of peremptory challenges does not apply when prosecutors offer reasons for their use of peremptory challenges on the record. Report at 14-15. The magistrate recommended that Walton's petition be conditionally granted and that he be released from custody unless the state began proceedings to retry him and correct the constitutional violation within a reasonable time after the final order of the district court. On March 6, 1989, the district court adopted the magistrate's recommendation and conditionally granted the writ. This timely appeal followed.

II.

A. Procedural Default and Exhaustion

The state first argues that the district court should not have reviewed Walton's equal protection claim because Walton failed to fairly present the issue to the state courts on direct appeal. The state argues that consideration of the claim is barred by the procedural default rule of *Wainwright v. Sykes*, 433 U.S. 72 (1977), and that Walton has not shown cause and prejudice necessary to excuse the default. The state contends that Walton expressly disavowed reliance on equal protection when he presented his direct appeal to the Missouri Court of Appeals and that Walton's motion to recall the mandate was not the proper procedural vehicle in which to raise the equal protection issue after *Batson* was decided. Walton admits that he framed his challenge to the prosecutor's exclusion of the African-American venirepersons in sixth amendment terms on his direct state appeal, but he argues that the Missouri Court of Appeals in fact decided his appeal on equal protection as well as sixth amendment fair cross-section grounds. Walton emphasizes that the Missouri Court of Appeals cited equal protection precedent in rejecting his appeal, and he argues that this establishes that the court actually considered and rejected his claim on equal protection as well as sixth amendment grounds. Walton further argues that he satisfied the exhaustion requirement by expressly raising the equal protection claim in his motion to recall the mandate. Walton alternatively argues that exhaustion was not necessary because it would have been futile. *See, e.g., Moore v. Wyrick*, 668 F.2d 1007,

1009 (8th Cir. 1982) (exhaustion either because no other presently available state remedies or substance of federal claims fairly presented to state courts).

Exhaustion of available state remedies is a prerequisite to seeking habeas relief. *See* 28 U.S.C. § 2254(b); *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (per curiam); *Picard v. Connor*, 404 U.S. 270, 276-77 (1971). We must determine whether Walton provided "the state courts with a 'fair opportunity' to apply controlling legal principles to the facts bearing upon his [equal protection] constitutional claim." *Anderson v. Harless*, 459 U.S. at 6 (quoting *Picard v. Connor*, 404 U.S. at 276-77). In the present case, the district court found that Walton had exhausted state remedies by raising the sixth amendment claim in his direct appeal and the equal protection claim in his motion to recall the mandate. *Walton v. Trickey*, No. 87-1510-C(2), slip op. at 2 (Apr. 13, 1988) (order). We cannot conclude this was error.

Before the Missouri Court of Appeals, Walton admitted that challenges of the prosecutor's exercise of peremptory challenges in a single case "have been rejected under an equal protection analysis that requires a record of county-wide discrimination to be developed over a period of year[s]." Brief for Appellant at 20 (citing *Swain* and *State v. Baker*, 524 S.W.2d 122 (Mo. 1975) (banc) (*Baker*)), *State v. Walton*, 703 S.W.2d 540 (No. 49171) (Mo. Ct. App. 1985). Walton's citation of *Swain* and *Baker* may have been sufficient in and of itself to provide the state courts with a fair opportunity to apply controlling legal principles to his equal protection claim. *See Graham v. Solem*, 728 F.2d 1533, 1535 (8th Cir.) (banc) ("[c]itation to a provision of the federal constitution or a case addressing the constitutional basis of the claim, or a discernible reference to a federal constitutional right is all that is normally required" to satisfy the 28 U.S.C. § 2254 exhaustion requirement), *cert. denied*, 469 U.S. 842 (1984); *Morrow v. Wyrick*, 646 F.2d 1229, 1232 (8th Cir.) (court considers fact that state cited two of the landmark Supreme Court cases on the confrontation clause in state court as evidence that the state "was able to identify the substance of petitioner's points of error"), *cert. denied*, 454 U.S. 899 (1981).

Even assuming that Walton expressly disavowed reliance on the equal protection component of his claim and instead cast it in purely sixth amendment terms, the record demonstrates that the Missouri Court of Appeals actually considered and rejected Walton's claim on *both* fourteenth amendment equal protection and sixth amendment fair cross-section grounds. The Missouri Court of Appeals rejected Walton's claim that a constitutional violation could be established by the prosecutor's discriminatory exercise of peremptory challenges in a single case, holding that defendants are required "to show systematic exclusion of blacks as trial jurors by use of peremptory challenges." *Walton*, 703 S.W.2d at 541-42, *citing Hurley*, 680 S.W.2d at 212, *and Swain*, 380 U.S. 202. *Swain*, of course, was the landmark equal protection case on peremptory challenges prior to *Batson*. In *Hurley*, the Missouri Supreme Court rejected, on equal protection grounds, a challenge to the prosecutor's exercise of peremptory challenges. 680 S.W.2d at 212. In *State v. Sims*, 639 S.W.2d 105, 108-09 (Mo. Ct. App. 1982), another case relied on by the *Walton* court, the Missouri Court of Appeals followed *Swain* in rejecting a sixth amendment fair cross-section challenge to the prosecutor's use of peremptory challenges. We believe the citation by the Missouri Court of Appeals to three equal protection cases in dismissing Walton's appeal confirms that it actually considered and rejected the unexpressed equal protection component of his claim. A habeas "[p]etitioner need not actually have raised a claim in a state petition in order to satisfy the exhaustion [requirement], if a state court with the authority to make final adjudications actually undertook to decide the claim on its merits in petitioner's case." 1 J. Liebman, Federal Habeas Corpus Practice and Procedure § 5.3, at 49 (1988) (footnote omitted). We agree with the Eleventh Circuit that even a single citation of federal precedent by the state court may make it "clear that the court was aware of a federal constitutional basis for petitioner's claim and that the court actually considered federal constitutional law in deciding that claim." *Sandstrom v. Butterworth*, 738 F.2d 1200, 1206 (11th Cir. 1984), *cert. denied*, 469 U.S. 1109 (1985). Because "a state court's decision to raise and answer a constitutional question *sua sponte* will also permit subsequent federal habeas review," *Cooper v. Wainwright*, 807 F.2d 881, 887 (11th Cir. 1986), *cert. denied*, 481 U.S. 1050 (1987), we hold that

Walton exhausted his state remedies and it was permissible for the district court to consider the merits of Walton's equal protection claim on habeas review.[6]

B. Application of *Batson* and *Garrett*

The state next argues that the district court erred in applying *Garrett* retroactively. In *Garrett*, 815 F.2d at 513, we held that once prosecutors volunteer their reasons for the exercise of peremptory challenges, they are no longer entitled to the *Swain* presumption that they exercised their peremptory challenges in a lawful manner. The state contends that *Garrett* announced a "new rule" within the meaning of *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1070 (1989) (plurality opinion) (*Teague*), and the district court should not have retroactively applied *Garrett* to Walton's petition for habeas relief. In response, Walton contends that he was entitled to the application of *Batson* because his case was not final when *Batson* was decided on April 30, 1986. Assuming he is not entitled to application of *Batson*, Walton

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[6]The district court held that Walton provided the state courts with a fair opportunity to address his equal protection claim by raising it in his motion to recall the mandate. *Walton v. Trickey*, No. 87-1510-C(2), slip op. at 2 (E.D. Mo. Apr. 13, 1988) (order). We give great deference to a district court's interpretation of the law of the state in which it sits. *Williams v. Wyrick*, 763 F.2d 363, 365 (8th Cir. 1985) (per curiam). A district court's interpretation of state law will be reversed only if it is fundamentally deficient in analysis or otherwise lacking in reasoned authority. *Davis v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 906 F.2d 1206, 1215 (8th Cir. 1990); *Perkins v. Clark Equip. Co.*, 823 F.2d 207, 208 (8th Cir. 1987). Because we hold that the Missouri Court of Appeals actually considered and rejected Walton's equal protection claim, we need not decide whether a motion to recall the mandate was the proper procedural vehicle to raise the equal protection claim. *Compare State v. Thompson*, 659 S.W.2d 766, 769 (Mo. 1983) (banc) ("our courts have property recognized that a mandate may be recalled in order to remedy a deprivation of the federal constitutional rights of a criminal defendant") *with Williams v. Wyrick*, 763 F.2d at 365 (motion to recall mandate a "limited" remedy; proper procedure for obtaining postconviction relief is by way of motion pursuant to Mo. Sup. Ct. R. 27.26). Nor do we need to address Walton's claim that it was not necessary to exhaust state court remedies because it would have been futile. *See Piercy v. Black*, 801 F.2d 1075, 1077-78 (8th Cir. 1986).

contends that because *Garrett* is only a logical extension of *Swain*, *Garrett* is not a "new rule" and the district court did not err in retroactively applying *Garrett*.

We disagree with Walton's contention that he is entitled to the application of *Batson*. *Batson* applies to all cases not final when it was decided. *Griffith v. Kentucky*, 479 U.S. 314, 316 (1987). *Batson* cannot be applied retroactively to cases that were final on April 30, 1986, the date *Batson* was decided. *Allen v. Hardy*, 478 U.S. 255, 260 (1986) (per curiam). The Supreme Court stated that a judgment of conviction is final when " 'the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before our decision in' *Batson v. Kentucky*." *Id.* at 258 n.1 (quoting *Linkletter v. Walker*, 381 U.S. 618, 622 n.5 (1965)). We must therefore determine whether Walton's conviction was final on April 30, 1986. The Missouri Court of Appeals affirmed Walton's conviction on December 17, 1985. *Walton*, 703 S.W.2d 540. The Missouri Court of Appeals denied Walton's motion for rehearing and/or transfer on January 21, 1986. *Id.* The Missouri Supreme Court denied Walton's application to transfer his case to that court on February 18, 1986. Under the Supreme Court Rules in effect at the time Walton's application to transfer was denied, he had 60 days[7] from February 18, 1986, to file his petition for certiorari. *See* Sup. Ct. R. 20.1 (1980).[8] Walton thus had until on or about April 19, 1986, to file

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[7] We disagree with Walton's contention that he had 90 days from the date his application to transfer was denied to file his petition for certiorari. Although Sup. Ct. R. 20.1 (1980) (emphasis added) permits a "Justice of [the Supreme] Court, *for good cause shown*, [to] extend the time for applying for a writ of certiorari in such cases for a period not exceeding 30 days," Walton failed to file a motion with the United States Supreme Court to extend the time for filing a petition for certiorari.

[8] The Supreme Court revised and renumbered its rules effective January 1, 1990. *See* Sup. Ct. R. 48. The text of Sup. Ct. R. 20.1 was moved to Sup. Ct. R. 13.1 and was revised to provide that petitions for certiorari must be filed with "*90* days after the entry of the order denying discretionary review." (Emphasis added.) If the 1990 Supreme Court Rules had been in effect at the time Walton's conviction was affirmed, his conviction would not have been final until May 19, 1986, 19 days after the *Batson* decision. However, under the 1980 version of the rules, his conviction was final on April 19, 1986, 60 days after his application to transfer was denied and 11 days before *Batson* was decided.

his petition for certiorari. Because Walton did not file a petition for certiorari, his conviction became final within the meaning of *Allen v. Hardy* on April 19, 1986, 60 days after his application to transfer was denied and 11 days before *Batson* was decided. Walton therefore is not entitled to the application of *Batson*.

We now turn to whether the district court erred in applying *Garrett* retroactively to Walton's case. In *Teague*, a plurality of the Supreme Court held that, with two exceptions,[9] "new rules" of constitutional criminal procedure should be applied retroactively to cases on direct review, but generally should not be applied retroactively to cases on collateral review. 109 S. Ct. at 1072-75. Because we are reviewing Walton's conviction on collateral review, we must determine whether *Garrett* announced a new rule of constitutional criminal procedure or merely applied the principles of *Swain* to a different factual situation.

In *Teague*, the Supreme Court reformulated the standard for determining when a case announces a new rule of constitutional criminal procedure:

> It is admittedly often difficult to determine when a case announces a new rule, and we do not attempt to define the spectrum of what may or may not constitute a new rule for retroactivity purposes. In general, however, a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government.... To put it differently, a case announces a new rule if the result was not *dictated* by

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[9] New rules of constitutional criminal procedure will be applied retroactively on collateral review in two circumstances. First, a rule will be applied retroactively when it decriminalizes a class of conduct previously proscribed, *see Teague v. Lane*, 109 S. Ct. 1060, 1073 (1989) (plurality) (*Teague*), or prohibits the state from imposing certain punishments for a given offense, *see Penry v. Lynaugh*, 109 S. Ct. 2934, 2952 (1989) (plurality). A new rule will also be applied retroactively in collateral proceedings when it is necessary to insure observance of those procedures that are "implicit in the concept of ordered liberty." *Teague*, 109 S. Ct. at 1073, 1075-77, *citing Mackey v. United States*, 401 U.S. 667, 693 (1971) (separate opinion of Harlan, J.) (internal citations omitted); *see also Butler v. McKellar*, 110 S. Ct. 1212, 1218 (1990) (same).

> precedent existing at the time the defendant's conviction became final.

Id. at 1070 (emphasis in original).

In recent retroactivity cases, the Supreme Court has further illuminated and applied the test for determining when a new rule has been announced. For example, in *Butler v. McKellar*, 110 S. Ct. 1212 (1990), the Court held that whether a rule is new or merely an application of existing precedent can be determined in part by whether the rule "was susceptible to debate among reasonable minds." *Id.* at 1217. The Court explained that "[t]he 'new rule' principle . . . validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." *Id.* In *Saffle v. Parks*, 110 S. Ct. 1257 (1990) (*Saffle*), the Supreme Court held that a rule would not be "new" if the state court "would have felt compelled by existing precedent to conclude that the rule [petitioner] seeks was required by the Constitution." *Id.* at 1260. Factors that should be considered in determining whether the rule was dictated by precedent existing at the time the petitioner's conviction became final include whether the existing precedent speaks to the issue and how other courts had ruled on the question at the time the petitioner raised the issue. *See id.* at 1261. With these retroactivity principles in mind, we examine whether *Garrett* merely applied the principles of *Swain* or whether it announced a new rule.

We believe it is worth quoting the magistrate's well-reasoned report and recommendation, which was adopted by the district court, on the relationship of *Garrett* to *Swain*:

> In *Swain*, the Supreme Court accorded a presumption of lawfulness to peremptory challenges and required that a complainant challenging the exercise of peremptory strikes, establish a systematic exclusion of blacks from petit juries over a period of time. . . . The Eighth Circuit did not announce a new constitutional privilege or doctrine in *Garrett* but merely applied extant principles to a different factual situation.

> The logical extension of *Swain* is that once reasons for peremptory challenges are volunteered, any presumption as to lawfulness becomes unnecessary and, in some instances, could be an absurdity in light of the reasons that may be given. Thus, ... *Garrett* is not antithetical to *Swain*, but is in fact a logical extension of the *Swain* holding . . . .
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> . . . .
>
> . . . At first blush, *Swain* appears to hold that only the *systematic* exclusion of black venirepersons constitutes a violation of a defendant's Fourteenth Amendment rights. . . . *Swain* [need not be read] so narrowly as to hold that the *systematic* exclusion of blacks is the [sole] measure of an individual's constitutional rights. *Swain* clearly held that a state's purposeful or deliberate denial of participation as a juror on account of race violates the Equal Protection Clause. *Swain*, 380 U.S. at 203-204. *Swain* only enunciates the systematic exclusion doctrine in the context of the burden of proof necessary to overcome the presumption of propriety of peremptory challenges given the valued position these challenges hold in our jurisprudence. However, the presumption dissipates when reasons for challenges are volunteered, and the stringent burden of proof of showing a systematic exclusion is no longer necessary. Thus, once the reasons for peremptory challenges are volunteered, a finding of exclusion of one or more venirepersons for discriminatory reasons constitutes a violation of the equal protection clause of the Fourteenth Amendment.

Report at 7-8, 14-15 (emphasis in original) (footnote omitted).

We hold that the district court did not err in holding that Walton was entitled to the retroactive application of *Garrett*. Several reasons persuade us that *Garrett* did not announce a new rule within the meaning of *Teague* and its progeny. First, in *Garrett* we held that once a prosecutor offered reasons for the exercise of peremptory challenges, a court could, consistent with *Swain*, scrutinize such reasons for compliance with the equal protection clause. *See* 815 F.2d at 511. To

that extent, we already decided in *Garrett* itself that *Garrett* is consistent with *Swain*, and we decline to reconsider our decision in *Garrett* today.

Secondly, it is important to understand that *Swain* had two distinct and, to some extent, irreconcilable holdings. While *Swain* is most renowned for its now overruled holding that prosecutors are presumed to have exercised their peremptory challenges in a lawful manner, *see* 380 U.S. at 222-23, the Court also held, and reaffirmed, that "a State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause." *Id.* at 203-04, *citing Ex parte Virginia*, 100 U.S. 339 (1880), *and Gibson v. Mississippi*, 162 U.S. 565 (1896); *see also Strauder v. West Virginia*, 100 U.S. 303 (1880). "This principle has been 'consistently and repeatedly' reaffirmed . . . in numerous decisions of this Court both preceding and following *Swain*." *Batson*, 476 U.S. at 84 (footnote omitted) (quoting *Swain*, 380 U.S. at 204). Under *Swain*, a defendant can establish a prima facie case of purposeful discrimination by proving that the prosecutor used his or her peremptory challenges "to exclude blacks from the jury 'for reasons unrelated to the outcome of the particular case on trial' or to deny to blacks 'the same right and opportunity to participate in the administration of justice enjoyed by the white population.' " *Batson*, 476 U.S. at 91 (quoting *Swain*, 380 U.S. at 224). The *Swain* Court sought to accommodate, albeit unsuccessfully, "the prosecutor's historical privilege of peremptory challenge free of judicial control and the constitutional prohibition on exclusion of persons from jury service on account of race." *Batson*, 476 U.S. at 91 (citations omitted). On the one hand, the exercise of peremptory challenges by prosecutors is presumed, but is not *per se*, lawful. *Swain*, 380 U.S. at 222. On the other hand, once prosecutors voluntarily offer their reasons for exercising their peremptory challenges, the presumption of lawfulness vanishes and we are compelled to effectuate *Swain*'s equal protection holding by determining whether the venirepersons were excluded because of their race. *See Garrett*, 815 F.2d at 511-12. In our view, *Garrett* can be read as announcing a new rule only if *Swain*'s holding that the exercise of peremptory challenges is presumptively lawful is

emphasized over *Swain*'s other holding that the exercise of peremptory challenges to exclude venirepersons because of their race violates the equal protection clause.

We are persuaded that precedent existing at the time of Walton's direct appeal required the Missouri Court of Appeals to examine the prosecutor's reasons for the exercise of his peremptory challenges once he volunteered his reasons for doing so. *See Saffle*, 110 S. Ct. at 1260; *Teague*, 109 S. Ct. at 1070. First, as discussed above, the Missouri Court of Appeals was required to implement *Swain*'s two-part holding. Secondly, at the time that court reviewed Walton's conviction, it had the benefit of our decision in *United States v. Greene*, 626 F.2d 75 (8th Cir.) (*Greene*), *cert. denied*, 449 U.S. 876 (1980). In *Greene*, the prosecutor used five of six peremptory challenges to exclude all the African-American venirepersons. *Id.* at 76. We held that, under *Swain*, a prosecutor's decision to use his or her peremptory challanges will be presumed proper *unless the record reveals that the challenges were used for impermissible reasons. Id.*; *see Garrett*, 815 F.2d at 512. The Missouri Court of Appeals also had the benefit of the Ninth Circuit's decision in *Weathersby v. Morris*, 708 F.2d 1493 (9th Cir. 1983) (*Weathersby*), *cert. denied*, 464 U.S. 1046 (1984). In *Weathersby*, the court held that once the prosecutor voluntarily puts his or her reasons for the peremptory challenges on the record,

> the prosecutor can no longer be cloaked by the presumption of correctness. Our reading of *Swain*, convinces us that in such circumstances a court need not blind itself to the obvious and the court may review the prosecutor's motives to determine whether "the purposes of the peremptory challenge are being perverted," *Swain*, 380 U.S. at 224, 85 S. Ct. at 838, by excluding an identifiable group "from juries for reasons wholly unrelated to the outcome of the particular case on trial." *Id.*

708 F.2d at 1496. In *Garrett*, we relied on *Weathersby* and *Greene* and held that the prosecutor's explanations for the exercise of peremptory challenges must be scrutinized when volunteered on the record. *See* 815 F.2d at 511-13. We believe that the precedents of *Swain*, *Greene*, and *Weathersby* dictated that the Missouri Court of Appeals examine

the prosecutor's reasons for the exercise of peremptory challenges once he stated them on the record.

We also draw support for our conclusion that *Garrett* did not announce a new rule from Justice White, the author of *Swain*. In his concurring opinion in *Batson*, Justice White made it clear that under *Swain*, once a prosecutor offered reasons for striking African-American venirepersons, these reasons could be scrutinized and invalidated under the equal protection clause if they were racially motivated:

> Nor would it have been inconsistent with *Swain* for the trial judge to invalidate peremptory challenges of blacks if the prosecutor, in response to an objection to his strikes, stated that he struck blacks because he believed they were not qualified to serve as jurors, especially in the trial of a black defendant.

Batson, 476 U.S. at 101 n.* (White, J., concurring).

In sum, we hold that *Garrett* "did not announce a new rule because it was 'merely an application of [existing] principle[s].'" *Teague*, 109 S. Ct. at 1073 (quoting *Yates v. Aiken*, 484 U.S. 211, 216-17 (1988)), and therefore the district court did not err in holding that *Garrett* could be applied retroactively to Walton's case.

C. Alleged Improper Findings of Fact

Having concluded that the district court did not err in applying *Garrett* retroactively, we turn to the state's final allegation of error. The state argues that the district court improperly resolved disputed issues of fact without holding an evidentiary hearing. The state argues that this case should be reversed and remanded for an evidentiary hearing to determine whether the prosecutor's exclusion of all but one of the African-American venirepersons and his failure to challenge similarly situated, white venirepersons was justified by nonracial trial considerations. The state further argues that the state court trial record fails to support the district court's findings that the prosecutor's use of peremptory challenges to exclude African-American venirepersons violated the equal protection clause. We disagree.

It is well established that an evidentiary hearing on a habeas corpus petition is not required where the issues can be resolved on the basis of the record. *Hill v. Lockhart*, 731 F.2d 568, 572 (8th Cir. 1984), *aff'd*, 474 U.S. 52 (1985). An evidentiary hearing is specifically not required where a record of the alleged error was made in state court and the district court independently reviewed the transcript of the state court proceeding. *Mitchell v. Wyrick*, 698 F.2d 940, 944 (8th Cir.), *cert. denied*, 462 U.S. 1135 (1983). In the present case, the prosecutor offered his reasons for striking the African-American venirepersons on the record, and the magistrate and the district court each independently reviewed the state court record. In addition, the magistrate and the district court each considered an affidavit filed in the district court by the prosecutor in opposition to Walton's petition. *See* Joint Appendix at 60-62 (affidavit of David M. Minnick). Under these circumstances, the magistrate and the district court could properly rely on the state court record and no evidentiary hearing was required.

The record in the present case clearly reflects that the prosecutor used all 14 peremptory challenges to exclude all but one of the African-American venirepersons, while he failed to exclude several white venirepersons who possessed the same allegedly objectionable characteristics as the excluded African-American venirepersons. For example, the prosecutor excluded African-American venirepersons Burnett, Greene and Ellis because each was a member of the nursing profession, and the prosecutor believed, based on his experience, that "nurses or those in the nursing profession tended to give people a second chance." Report at 11. The magistrate noted that although "this may have been a proper trial-related consideration," *id.*, the prosecutor failed to challenge white venirepersons Bursatti and Hacker, each of whom was also in the nursing profession. *Id.* As the magistrate noted, "[i]f, as the prosecutor asserted, those involved in nursing tend to be sympathetic to the defense, then this tendency would seem to apply regardless of race." *Id.* at 12. Similarly, the prosecutor excluded African-American venirepersons Shavers and Brown because each had friends or relatives who had been charged with or convicted of a crime. However, the prosecutor did not challenge several white jurors who had "stated that they, too, had friends and relatives who had been

convicted of crimes and, in some cases, crimes that were similar to those charged against [Walton]." *Id.* In particular, as noted by the magistrate, the record establishes that

> [white] venireperson Gibson's son had previously been convicted of burglary and was facing a then-pending charge of receiving stolen property. [White v]enireperson Barton's husband had been convicted of burglary and [white] venireperson Hickey's friend had been convicted of an offense involving the use of a knife. Additionally, [white] venireperson Gremminger knew a man who had been prosecuted for selling drugs and a nephew of [white] venireperson Rogers had served time for an unspecified offense.

Id. at 12-13.

In *Garrett*, we recognized that an equal protection violation could be established if prosecutors use their peremptory challenges to exclude African-American venirepersons for a given reason or reasons, but then fail to apply the same reason or reasons to exclude similarly situated, white venirepersons. 815 F.2d at 513-14. In the present case the prosecutor stated his reasons for excluding all the African-American venirepersons on the record. The district court found that those reasons were pretextual because they were not consistently applied to whites. The state court record was fully developed and supplemented by an affidavit. Nothing could be accomplished by remanding this case for an evidentiary hearing and further findings. Accordingly, we hold that the record supports the district court's finding that the prosecutor's use of peremptory challenges violated the equal protection clause.

III.

In sum, we hold that (1) the district court did not err in holding that Walton had fairly presented his equal protection claim to the state courts, (2) Walton is not entitled to application of *Batson*, (3) the district court did not err in applying *Garrett* retroactively to Walton's case, (4) the district court did not err in deciding Walton's equal

protection claim without holding an evidentiary hearing, and (5) the record supports the district court's finding that the prosecutor's use of peremptory challenges violated the equal protection clause.

Accordingly, the order of the district court conditionally granting Walton's petition for a writ of habeas corpus is affirmed. It is hereby order that Walton be discharged from custody unless the state commences proceedings to retry him within 60 days from the date of this decision.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 87-1510 C (2)

DAVID E. WALTON,
Petitioner,

v.

MYRNA TRICKEY,
Respondent.

JUDGMENT

In accordance with the order filed this date and incorporated herein,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that petitioner David E. Walton shall have judgment against respondent Myrna Trickey and that the petition of David E. Walton for habeas corpus relief be conditionally GRANTED, with the writ to issue in the event that the State of Missouri fails to begin proceedings to retry petitioner for the crimes charged within sixty (60) days of the date of this order.

Dated this 6th day of March, 1989.

/s/ Edward L. Filippine
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 87-1510 C (2)

DAVID E. WALTON,
Petitioner,

v.

MYRNA TRICKEY,
Respondent.

ORDER

This matter is before the Court on the petition of David E. Walton for a writ of habeas corpus. The matter was referred to United States Magistrate Carol E. Jackson, who has filed her Report and Recommendation. 28 U.S.C. §636(b). Respondent has filed objections thereto.

After careful consideration,

IT IS HEREBY ORDERED that the Report and Recommendation of the United States Magistrate is SUSTAINED and ADOPTED.

IT IS FURTHER ORDERED that petitioner's motions for summary judgment and for the appointment of counsel are DENIED.

An appropriate judgment shall accompany this order.

Dated this 6th day of March, 1989.

/s/ Edward L. Filippine
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 87-1510-C(2)

DAVID E. WALTON,
Petitioner,

vs.

MYRNA TRICKEY,
Respondent.

SUPPLEMENTAL OBJECTIONS TO MAGISTRATE'S REPORT AND RECOMMENDATION

Comes now respondent, by and through counsel, and states as follows in further objection to the Magistrate's Report and Recommendation of November 10, 1988. On or about November 21, 1988, respondent filed objections to the Magistrate's Report and Recommendation in this Court. In those objections, respondent indicated that he would file a further affidavit from the trial prosecutor. Respondent will not now file that affidavit, but respondent wishes to make clear to the Court that were the Court to order an evidentiary hearing, respondent would expect to produce petitioner's trial prosecutor, who would state for the record his reasons for striking each venireperson mentioned in the Magistrate's Report and, as well, his reasons for failing to strike venirepersons whom the Magistrate identified as having similar characteristics to those venirepersons stricken. The trial prosecutor will testify as to each of the eight venirepersons identified in the Magistrate's Report—namely, Venirepersons Brusatti, Hacker, Gibson, Barton, Hickey, Gremminger, Rogers and Moore. This Court will then have before it a sufficient factual record from which to make its decision in this case.

Conclusion

WHEREFORE, for the reasons herein stated, respondent prays that this Court dismiss this petition without further judicial proceedings.

Respectfully submitted,

WILLIAM L. WEBSTER
Attorney General

/s/ Patrick King
PATRICK L. KING
Assistant Attorney General
Bar No. 33826

Post Office Box 899
Jefferson City, Missouri 65102
(314) 751-3321

Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was mailed, postage prepaid, this 23 day of November, 1988, to:

David Walton
No. 151492
MECC
18701 Old Highway 66
Pacific, MO 63069

/s/ Patrick King
PATRICK L. KING

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 87-1510C(2)

DAVID WALTON,
Petitioner,

vs.

MYRNA TRICKEY,
Respondent.

OBJECTIONS TO MAGISTRATE'S REPORT AND RECOMMENDATION

Comes now respondent, by and through counsel, and states as follows in objection to the Magistrate's Report and Recommendation in the above-styled case.

On November 10, 1988, United States Magistrate Carol Jackson issued the Magistrate's Report and Recommendation in the above-styled case. The Magistrate recommended that petitioner's petition for a writ of habeas corpus be granted. The Magistrate based her recommendation on her finding that petitioner's trial prosecutor exercised his peremptory challenges in a racially discriminatory manner, and therefore, petitioner's rights under the Equal Protection Clause of the Fourteenth Amendment were violated. Because the Magistrate's Report and Recommendation is objectionable on three grounds, this Court should decline to adopt the Magistrate's Report and Recommendation.

I. Garrett is Not Retroactive

Petitioner in [h]is petition alleged that his trial prosecutor violated his equal protection rights by striking all the blacks from petitioner's jury. Respondent responded that, merely by stating the prosecutor struck all the blacks from his jury panel, that petitioner failed to make

out a claim under the Equal Protection Clause. *See*, Respondent's Response of August 23, 1988. Under the law in effect at the time of petitioner's trial, petitioner could only make out a claim under the Equal Protection Clause by showing his prosecutor used peremptory challenges to strike blacks in a series of cases amounting to a systematic exclusion of blacks in those cases. *See, Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). Of course, petitioner fails to state a claim under th[e] *Swain* standard.[1]

The Magistrate found petitioner had made out a claim for relief under the rule in *Garrett v. Morris*, 815 F.2d 509 (8th Cir.), *cert. denied*, 479 U.S. 963 (1986). *See*, Magistrate's Report and Recommendation (hereinafter "R & R") at 5-7. In *Garrett*, the Eighth Circuit acknowledged that a prosecutor's use of peremptory strikes is presumed lawful. *See, Garrett, supra*, 815 F.2d at 511. However, the *Garrett* court held that when the prosecutor volunteers his reasons for striking each juror on the record, that presumption of lawfulness falls away, and the reviewing court may scrutinize the prosecutor's proffered reasons to see whether they are a pretext for discrimination. *Garrett, supra*, 815 F.2d at 511. The Magistrate found that petitioner's trial prosecutor had volunteered his reasons on the record, *see*, R & R at 4, and therefore, under *Garrett*, the prosecutor's reasons were open to scrutiny by the federal habeas court. The Magistrate went on to conclude that as to six of the venirepersons as to whom petitioner's trial prosecutor offered peremptory challenges, petitioner's trial prosecutor had engaged in racial discrimination in making his challenges.

The Magistrate began her analysis by finding that *Garrett* applied to the case at bar. Respondent, in his response of August 23, 1988, had argued *Garrett* should not be applied to petitioner's case because *Garrett* was not in force at the time of petitioner's trial, and it should not be applied retroactively to petitioner's case. The Magistrate,

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[1] Petitioner, likewise, could not rely on the Supreme Court's holding in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The *Batson* decision, which essentially overruled *Swain*, was held not to apply to cases, like petitioner's, which were final before *Batson* was decided. *See, Allen v. Hardy*, 478 U.S. 2550, 106 S.Ct. 2878, 92 L.Ed.2d 199 (1986) (*per curiam*).

however, found that because *Garrett* represented only a "logical extension of *Swain*," *Garrett* should be held to be retroactive to petitioner's case. *See*, R & R at 8. Respondent objects to this finding by the Magistrate that *Garrett* should be applied retroactively to petitioner's case, and respondent will explain as follows:

In *Allen, supra*, the Supreme Court set forth three factors to be considered when a court decides to apply a new rule retroactively. Those factors are (1) the purpose to be served by the new standards, (2) the extent of the reliance by law enforcement authorities on the old standards, and (3) the effect on the administration of justice of a retroactive application of the new standards. *Allen, supra*, 106 S.Ct. at 2880, *citing*, *Solem v. Stumes*, 465 U.S. 638, 643, 104 S.Ct. 1338, 79 L.Ed.2d 579 (1984) (*quoting*, *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967)). Significantly, weighing those three factors, the Supreme Court decided not to apply its *Batson* decision retroactively to cases on collateral review. Those three factors which weighed against retroactivity of the *Batson* case also weigh against retroactivity of *Garrett*. First, because *Garrett* is designed only to ensure the Equal Protection Clause rights of prospective jurors, as asserted by a defendant on their behalf, are respected, the *Garrett* rule did not so "enhance the accuracy" of the factfinding process at the criminal trial as to compel its retroactive application. *See*, *Allen, supra*, 106 S.Ct. at 2880, *citing*, *Solem, supra*, 465 U.S. at 643.

The second *Allen* factor also weighs against retroactive application of *Garrett* as well. As the Supreme Court found in *Allen*, "There is no question that prosecutors, trial judges, and appellate courts throughout our state and federal systems justifiably have relied on the standard of *Swain*." *Allen, supra*, 106 S.Ct. at 2881. Third, when the Supreme Court swept away the *Swain* standard in *Batson, supra*, that decision so affected the orderly administration of justice that the Supreme Court curtailed its retroactive effect. *Garrett* has a similar effect on the administration of justice. *Garrett* essentially holds that the *Swain* presumption disappears when the prosecutor volunteers his reasons on the record. Like the effect of *Batson*, the effect of *Garrett* is that prosecutors may no longer rely on the presumption that their challenges were exercised lawfully. Thus, the effect on the administration of

justice is the same after *Garrett* as the effect of the *Batson* decision. This Court should refuse to apply *Garrett* retroactively for that reason.

It is significant that the Supreme Court in *Allen* said: "A new standard 'is almost automatically non-retroactive' where the decision 'has explicitly overruled past precedent.' " *Allen, supra*, 106 S.Ct. at 2880, *citing, Solem, supra*, 465 U.S. at 646. Respondent submits that despite the Magistrate's assertion to the contrary, *Garrett* essentially overruled *Swain*.

Swain held that a prosecutor is presumed to have lawful reasons for making each peremptory challenge although those reasons are not easily articulated. *See, Swain, supra*, 380 U.S. at 220. Given that premise, however, *Garrett* is not a logical extension or application of *Swain*. Rather, the *Garrett* holding turns *Swain* on its head. In *Garrett*, the Eighth Circuit held that when the trial prosecutor confirms the *Swain* presumption that his reasons were lawful by stating those lawful reasons for his peremptory challenges on the record, the *Swain* presumption disappears. *Garrett, supra*, 815 F.2d at 511. That result, rather than an extension of *Swain*, appears to be the antithesis of *Swain*. In the first place, the *Swain* decision itself does not contemplate the possibility that a prosecutor, by volunteering his reasons on the record for exercising his peremptory challenges, could lose the protection of the *Swain* presumption. If that possibility were only a logical step removed from *Swain*, as the Magistrate suggests in the instant case, the *Swain* Court could well have dealt with the *Garrett* situation or given guidance in *Swain* as to when the *Swain* presumption might disappear. Of course, the *Swain* court did not do so. In fact, the *Swain* [C]ourt no where indicated that a defendant could make out an equal protection claim under the *Swain* standard by alleging discrimination in a single case whether or not the prosecutor in that case had proffered reasons on the record. *See, Swain*, 380 U.S. at 227. Thus, insofar as *Garrett* holds a defendant may overcome the *Swain* presumption by showing the prosecutor's reasons in a single case, *Garrett* does serve to overrule past precedent. Secondly, while it is true enough that the *Swain* presumption should not be a cloak for unlawful activity by prosecutors—as when a prosecutor volunteers reasons on the record which are

unlawful—it is logically inconsistent with *Swain* for the court to rule—as it did in *Garrett*—that a presumption of lawfulness disappears when lawful reasons are volunteered for the prosecutor's peremptory challenges. Rather, the lawful reaons and the presumption combine to refute the claim of purposeful discrimination.

Consequently, despite the Magistrate's finding to the contrary, it is difficult to see *Garrett* as a "logical extension" of *Swain*. It is clear that *Garrett*, in fact, represents a departure from *Swain* or, more accurately, an application by the Eighth Circuit of *Batson* via the "back door"—an approach seemingly prohibited in *Allen v. Hardy*, *supra*. Because *Garrett* represents a break with precedent and because *Garrett* fails to meet the criteria for retroactivity announced in *Allen v. Hardy*, this Court should refuse to apply *Garrett* retroactively to this case. Because the Magistrate held that *Garrett* applied to the instant case, this Court should sustain respondent's objections to the Magistrate's Report and Recommendation on this ground.

II. Magistrate's Findings Lack Factual Support

As respondent described earlier, *supra*, the Magistrate, in her Report and Recommendation, determined that the trial prosecutor's peremptory challenges were exercised in a racially discriminatory manner as to six of the venirepersons at petitioner's trial. The Magistrate made her conclusion by taking the prosecutor's proffered reason for striking each prospective juror he struck and comparing those reasons to the trial transcript to see both whether those reasons were supported by the factual record and to see whether other "presumably white" venirepersons with similar characteristics were similarly treated (R & R at 11). Whatever the merits of this method of comparison, it is clear that the Magistrate lacked sufficient factual bases for her conclusions that the trial prosecutor exercised his peremptory challenges in a racially discriminatory manner. Respondent objects because it does not affirmatively appear from the record that the white persons left on the panel by the prosecutor and that the black venirepersons struck by the prosecutor were similar in every crucial respect except race.

Essentially, the Magistrate found that there were other venire persons who were white and who were left on the jury panel although they had the same characteristics cited by the prosecutor in his challenges of black venirepersons. For example, Venirepersons Burnett, Greene and Ellis were stricken by petitioner's trial prosecutor because they were nurses or in the nursing profession and they tended to give people a second chance. *See*, R & R at 11. That much of the record is clear. However, the Magistrate then went on to compare those stricken venirepersons to Venirepersons Bursatti and Hacker, whom the Magistrate claims were "also in the nursing profession." *Id.* From the trial transcript and the affidavit filed by respondent in his "Suggestions in Opposition to Petitioner's Motion for Summary Judgment" filed August 30, 1988, there is no indication as to whether Venirepersons Bursatti and Hacker were similar in every crucial respect to Burnett, Greene and Ellis except that the former two are white and the latter three are black. The Magistrate was ill-equipped to determine whether the prosecutor's proffered reasons for exercising his challenges were merely not credible when the record is not clear as to the characteristics of each juror stricken and each juror left on the panel.

The focus of the Magistrate's inquiry was not on the venirepersons who were stricken, but on the venirepersons who were left on the panel. In order to develop a record sufficient to make a decision on petitioner's equal protection claim, it would be necessary for the Magistrate to hold an evidentiary hearing at which the court inquires of the prosecutor as to his reasons for failing to strike the white venirepersons on the panel. For example, there may have been a reason apart from their race as to why the prosecutor declined to strike Bursatti and Hacker. Nonetheless, despite the presence of a factual controversy, which should be resolved by an evidentiary hearing, the Magistrate failed to hold such a hearing and instead presumed that the white venirepersons left on the panel were similar to the stricken black venirepersons in every crucial respect. This presumption does not find support in the factual record, and therefore, this Court should sustain respondent's objection to the Magistrate's Report and Recommendation or, in the alternative, remand to the Magistrate for an evidentiary hearing on petitioner's claim.

III. Necessity For A Hearing

As an initial matter, this Court should find there is no need for a hearing in this case. The trial court believed the prosecutor's proffered reasons for challenging the veni repersons when it overruled petitioner's motion for a new trial. *See*, Respondent's Exhibit B at 2. That finding amounted to a finding of fact that the prosecutor's proffered reasons were credible and not a pretext for discrimination. The trial court's finding of fact is entitled to the presumption of correctness under 28 U.S.C. §2254(d) since it is fairly supported on the record by the prosecutor's stated reasons and by the trial judge's observation of voir dire. This finding of fact that the prosecutor's reasons were credible may not be disturbed by the federal habeas corpus court, much less ignored by the court—as the Magistrate does here. *See, Sumner v. Mata*, 449 U.S. 539,. 101 S.Ct. 764, 66 L.Ed.2d 722 (1981).

The Magistrate should not have ignored the trial judge's finding of fact and gone forward to make an independent credibility determination as to the prosecutor's stated reasons. Even if the Magistrate disbelieves the prosecutor, that is not a sufficient basis for undoing the trial court's credibility determination. *See, Landano v. Rafferty*, 670 F.Supp. 570, 58 (D.N.J. 1987). This Court should find that the trial judge's finding of fact that the prosecutor's stated reasons were credible is a finding presumed correct under §2254(d). Insofar as the Magistrate found otherwise, respondent objects to the Magistrate's Report and Recommendation.

In the alternative, should this Court decide, for whatever reason, that the presumption of credibility does not apply, this Court should remand for an evidentiary hearing.

The heart of the *Garrett* analysis is that when the prosecutor volunteers his reasons on the record for exercising peremptory challenges, the prosecutor is thus opening those reasons up for scrutiny to see whether the prosecutor is in fact exercising those peremptory challenges in a lawful manner or, instead, offering those lawful reasons as a pretext for racial discrimination. When boiled to its essence, the *Garrett* standard demands that the reviewing court assess

the trial prosecutor's credibility. For example, if the trial prosecutor stated on the record that he moved to strike Juror A because he wore a plaid shirt, the reviewing court must then determine from the record whether that reason was the "real" reason or whether the prosecutor was merely offering that reason as a pretext for racial discrimination. The reviewing court must thus decide either to believe or disbelieve the trial prosecutor.[2]

The federal reviewing court must therefore make a credibility determination. Such a credibility determination can only properly be made after an examination of the trial prosecutor at an evidentiary hearing. The habeas court should not rely on the cold record and affidavits to make its factual determination of the prosecutor's credibility. Insofar as the prosecutor alleges in his affidavit, *see*, "Respondent's Suggestions in Opposition to Petitioner's Motion for Summary Judgment," "Affidavit of David N. Minnick," that he did not exercise his peremptory strikes because of racial bias, there is before the Court a factual controversy as to what the reasons were for the prosecutor's use of his peremptory challenges. The proper action for a federal habeas court to take when a factual controversy is before it is to order an evidentiary hearing. *See, Speedy v. Wyrick*, 702 F.2d 723, 726 (8th Cir. 1983). The court should not do as the Magistrate did in this case and make its credibility determination from the cold trial-court record and the affidavits before it.[3] Because the Magistrate made a credibility determination and resolved a factual dispute without holding an evidentiary hearing,[4] respondent objects to the Magistrate's

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[2]Apparently the trial judge believed the prosecutor's strikes were not made in a racially discriminatory manner since the trial judge overruled defense counsel's motion for a mistrial based on the prosecutor's use of his peremptory strikes. *See*, Trial Transcript (hereinafter "Tr.") at 225.

[3] Respondent will supplement these objections with a further affidavit from petitioner's trial prosecutor and expects to file that affidavit as an exhibit with the Court within five days of the date of these objections.

[4] Other circuits, when presented with a credibility determination on a Fourth Amendment issue, have ruled an evidentiary hearing is necessary to resolve the credibility issue. *See, e.g., Willis v. Zant*, 720 F.2d 1212, 1219-1220 (11th Cir. 1983).

Report and Recommendation and prays the Court will sustain her objections and remand to the Magistrate for an evidentiary hearing.

Conclusion

WHEREFORE, for the reasons herein stated, respondent prays that this Court sustain her objections to the Magistrate's Report and Recommendation and that this Court decline to adopt the Magistrate's Report and Recommendation.

Respectfully submitted,

WILLIAM L. WEBSTER
Attorney General

/s/ Patrick King
PATRICK L. KING
Assistant Attorney General
Bar No. 33826

Post Office Box 899
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Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was mailed, postage prepaid, this 21 day of November, 1988, to:

David Walton
Reg. No. 151492
MECC
18701 Old Highway 66
Pacific, MO 63069

/s/ Patrick King
PATRICK L. KING

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 87-1510-C (2)

DAVID E. WALTON,
Petitioner,

v.

MYRNA TRICKEY,
Respondent.

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE

This matter is before the Court upon the petition of David E. Walton for a writ of habeas corpus under 28 U.S.C. §2254 and the petitioner's motions for appointment of counsel and for summary judgment. This matter was referred to the undersigned United States Magistrate for a report and recommended disposition pursuant to 28 U.S.C. §636(b).[1]

In 1984 a jury in the Circuit Court of the City of St. Louis, Missouri found Walton guilty of first degree robbery, first degree tampering,

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[1] When this matter was previously before the Court the undersigned concluded that petitioner's grounds for federal habeas relief had been exhausted, but that petitioner failed to state a Sixth Amendment claim based upon the exclusion of black venirepersons from the jury panel. In addition, the undersigned concluded that petitioner had not shown a systematic exclusion of blacks from petit juries in order to establish a violation of his Fourteenth Amendment right of equal protection. *See*, Report and Recommendation of December 18, 1987. The district court sustained the undersigned's findings as to the issue of exhaustion and petitioner's Sixth Amendment claim, but remanded the cause for further consideration in light of *Garrett v. Morris*, 815 F.2d 509 (8th Cir.), *cert. denied*, 108 S.Ct. 233 (1987). *See*, Order dated April 13, 1988. Following remand, the respondent was ordered to respond to the merits of petitioner's claim. The response essentially challenged the retroactivity of *Garrett v. Morris, supra*, but it was accompanied by an affidavit of the prosecutor setting forth his reasons for the peremptory challenges.

and armed criminal action. He was sentenced to concurrent terms of imprisonment of fifteen years on the robbery charge and ten years on the tampering charge, to be following by a consecutive five-year term of imprisonment on the armed criminal action charge.

On appeal, Walton asserted that the prosecution's use of peremptory challenges to remove black members of the venire panel constituted a violation of his Sixth Amendment right to a jury selected from a fair cross-section of the community. The Missouri Court of Appeals, however, rejected Walton's argument on the grounds that he had not shown a pattern of systematic exclusion of black venirepersons as required by *Swain v. Alabama*, 380 U.S. 202 (1965) and Missouri case law. Walton's conviction and sentence were affirmed on appeal. *State v. Walton*, 703 S.W.2d 540 (Mo. App. 1985) (Resp. Exh. E). Thereafter, Walton filed a motion and supplemental motion to recall the mandate seeking a remand of the case for a new trial in light of the United States Supreme Court's decision in *Batson v. Kentucky*, 476 U.S. 79 (1986), holding that a prosecutor's use of peremptory challenges to strike black members from the jury may violate the equal protection clause of the Fourteenth Amendment. The Missouri Court of Appeals summarily denied petitioner's motions to recall the mandate. *State v. Walton*, No. 49171, (Mo. App. E.D., May 28, 1987).

As grounds for federal habeas corpus relief, petitioner asserts that the prosecutor's use of peremptory challenges to exclude black venirepersons from the jury panel during his criminal trial violated his rights under the equal protection clause of the Fourteenth Amendment. His second ground for relief is that the prosecutor's exercise of peremptory challenges to strike black venirepersons operated to deprive him of his Sixth Amendment right to a jury composed of a fair cross-section of the community. The district court has previously held that there is no Sixth Amendment exception to the equal protection analysis in *Swain v. Alabama*, 380 U.S. 202 (1965). *See*, Order dated April 13, 1988 at p. 6. Consequently, only petitioner's claim of the denial of equal protection is before the Court.

The record reveals that at the conclusion of the voir dire examination, the prosecuting attorney exercised all of his fourteen peremptory

challenges to strike black venirepersons. As a result, the jury was comprised of twelve white jurors and one black alternate juror. Defense counsel moved for a mistrial based upon the fact that the prosecutor's peremptory challenges were directed only toward black venirepersons. Defense counsel argued that the prosecutor's exercise of peremptory challenges in this fashion demonstrated a systematic exclusion of blacks from the jury. The prosecuting attorney denied the systematic exclusion of blacks from the jury and further declined to offer any reasons for his challenges relying upon the general rule of law that peremptory challenges can be made for any reason or for no reason at all. (Resp. Exh. A at 219-226).

Later, however, the prosecutor, after renewing his objection to the inquiry as to why the peremptory strikes were made, offered the following reasons for the challenges (Resp. Exh. A at 395-403):

Venireperson Brown was struck because he had a nephew with whom he had a close relationship who was then awaiting trial on charges of murder and burglary. (Resp. Exh. A at 396). Venireperson Kirkman was struck because of a familial relationship with a former assistant circuit attorney, which the prosecutor thought might cause an adverse affect on his decision of the case. (*Id.*). Venireperson Coleman was struck because the tone of her answers in response to defense counsel's inquiries indicated to the prosecutor that Coleman may have some difficulty with identification testimony. (*Id.*). Venireperson Albert Smith was struck because the prosecutor did not particularly like the way he responded to the voir dire questions. (*Id.*). Venireperson Davis was struck because she indicated that she can fall asleep while just sitting. (*Id.* at 397). The prosecutor struck venireperson Lindsey because he thought it odd that she never answered a single question. (*Id.*). The prosecutor found that venireperson Thelma Prince appeared agitated or upset that she had to be present and listen to counsels' questions, and she was struck on this basis. (*Id.* at 397). Venirepersons Burnett, Greene and Ellis were struck by the prosecutor because their nursing vocations indicated, in the prosecutor's experience, that they had a bias toward giving people a second chance or a "break." (*Id.* at 398-399). In addition, there was "something" about venireperson

Burnett that "just didn't strike with [the prosecutor]." (Resp. Exh. A at 398). Venireperson Shavers was challenged because of her friendship with a man who had been convicted of a drug charge which the prosecutor felt might affect her impartiality as a juror. (*Id.*). Venireperson Carl Smith was struck because he appeared to the prosecutor to be intoxicated. (*Id.* at 399). The prosecutor did not make a record as to why he struck venireperson Frederick Prince. Additionally, the record is somewhat unclear with respect to the challenge of venireperson White. The prosecutor stated that he struck Mr. White for the same reason "as the previous juror." (Resp. Exh. A at 349). However, Ms. Shavers was the venireperson discussed directly before Mr. White, and there is nothing in the record showing that White, like Shavers, had a friend who had been convicted of a crime.

The affidavit of the prosecutor filed in response to the habeas petition reiterates the reasons given on the record for striking venirepersons Brown, Kirkman, Coleman, Albert Smith, Davis, Lindsey, Thelma Prince, Burnett, Greene, Ellis, Shavers, and Carl Smith. In addition, the prosecutor states in his affidavit that venireperson White was challenged because he did not answer any voir dire questions. Further, the prosecutor states that venireperson Frederick Prince was challenged because he knew an associate circuit judge and was familiar with guns.

I. Retroactive Application of *Garrett v. Morris*

In *Swain v. Alabama*, 380 U.S. 202 (1965), the Supreme Court held that an accused may establish a violation of his right of equal protection by the prosecutor's systematic exclusion of blacks from juries in a series of cases.[2] The *Swain* decision was based on the presumption that the prosecutor, in exercising his peremptory challenges, did so based on acceptable trial related considerations which are not always easily articulated. *Id.* at 220-221.

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[2] While *Batson v. Kentucky*, 476 U.S. 79 (1986), significantly relaxed the standard in *Swain*, *Batson* is not controlling here as petitioner's conviction became final before *Batson* was announced. *See, Allen v. Hardy*, 478 U.S. 2550 (1986) (per curiam) (*Batson* not applied retroactively to collateral review of convictions that became final before *Batson* opinion was announced).

The Eighth Circuit has held, however, that *Swain* does not insulate a prosecutor's use of peremptory challenges where he has volunteered the reasons for his actions. *Garrett v. Morris*, 815 F.2d 509 (8th Cir.), *cert. denied*, 479 U.S. 963 (1986). *See also, United States v. Andrade*, 788 F.2d 521 (8th Cir. 1986); *United States v. Greene*, 626 F.2d 75 (8th Cir), *cert. denied*, 449 U.S. 876 (1980). Thus, when the record reveals the reasons for the challenges, the court may inquire as to whether the challenges are based upon constitutionally permissible trial related considerations or if they are merely a pretext for discrimination. *Id.*

Respondent argues that this Court, following the analysis set forth in *Allen v. Hardy*, 478 U.S. 255 (1986) (per curiam), should reconsider its holding that *Garrett v. Morris, supra*, applies retroactively to the instant case. Respondent contends that *Garrett* was a significant departure from *Swain* and, as such, does not have retroactive effect. Respondent further argues that this Court should decline to apply *Garrett* retroactively because the Supreme Court has recently granted certiorari in *Teague v. Lane*, 820 F.2d 832, 834 n.6 (7th Cir. 1987), *cert. granted*, 108 S.Ct. 1107 (1988), in which the Seventh Circuit declined to follow *Weathersby v. Morris*, 708 F.2d 1493 (9th Cir. 1983), *cert. denied*, 464 U.S. 1046 (1984), the case upon which the Eighth Circuit relied in deciding *Garrett*. Respondent asserts that this Court should decline to apply *Garrett* as long as "there is the possibility its essential holding will be overruled by the Supreme Court."

Generally, judicial decisions apply retroactively. *Solem v. Stumes*, 465 U.S. 638, 642 (1984). An issue of retroactivity is presented only when a new rule of law is established that breaks with past precedent. *Martin v. Wyrick*, 568 F.2d 583 (8th Cir.), *cert. denied*, 435 U.S. 975 (1978); *Lincoln v. Dist. 9 of Intern. Ass'n of Machinists and Aerospace Workers*, 723 F.2d 627 (8th Cir. 1983). The primary issue in determining retroactivity is whether the court ruling in question is one of first impression or was clearly foreshadowed. *Rudolph v. Wagner Elec. Corp.*, 586 F.2d 90 (8th Cir. 1978), *cert. denied*, 441 U.S. 924 (1979).

In the instant case, the undersigned concludes that the *Garrett* decision did not constitute such a break with past precedent so as to require further consideration of the criteria set forth in *Allen* governing

the resolution of the retroactivity issue. In *Swain*, the Supreme Court accorded a presumption of lawfulness to peremptory challenges and required that a complainant challenging the exercise of peremptory strikes, establish a systematic exclusion of blacks from petit juries over a period of time. The very nature and purpose of peremptory challenges, that is, a challenge "without a reason stated, without inquiry and without being subject to the court's control . . . for a real or imagined partiality that is less easily designated or demonstrable [than a challenge for cause]", required the presumption of lawfulness. *Id.* at 219. The purpose of the presumption was to allow the parties greater flexibility in obtaining a fair and impartial jury. The Supreme Court did recognize that the presumption could be overcome, but only by bearing the heavy burden of proving systematic exclusion. *Id.* at 223-224. The Eighth Circuit did not announce a new constitutional privilege or doctrine in *Garrett* but merely applied extant principles to a different factual situation.

The logical extension of *Swain* is that once reasons for peremptory challenges are volunteered, any presumption as to lawfulness becomes unnecessary and, in some instances, could be an absurdity in light of the reasons that may be given. Thus, the undersigned concludes that *Garrett* is not antithetical to *Swain*, but is in fact a logical extension of the *Swain* holding and therefore does not meet the primary criterion for nonretroactivity.

Furthermore, *Garrett* remains the law of this Circuit unless and until the Eighth Circuit or the Supreme Court rules to the contrary. This Court cannot anticipate the Supreme Court's ruling in *Teague* based merely on the grant of certiorari. In *Teague*, the Seventh Circuit rejected petitioner's equal protection argument under *Swain* based upon an independent and adequate procedural bar to review and limited its considerations to a Sixth Amendment analysis. *Teague*, 820 F.2d at 832 n.6. Thus, the appellate court's rejection of the *Weathersby* analysis can be classified as dictum.

II. Merits

Under *Garrett*, this Court has the duty to review the record to determine if the reasons volunteered by the prosecutor are fairly supported by the record or are merely a pretext for purposeful discrimination. *Garrett*, 815 F.2d at 513-514. In the instant case, the undersigned initially finds that the peremptory challenges to venirepersons Davis and Carl Smith were based upon proper trial considerations. Ms. Davis admitted during voir dire that she can fall asleep while sitting and Mr. Smith appeared to be intoxicated. Whether a juror is coherent and can maintain concentration during trial are proper considerations for the prosecution and defense alike. The undersigned further notes that Ms. Davis was the subject of defense counsel's motion to strike for cause. (Resp. Exh. A at 111-113). The prosecutor declined to agree to strike Ms. Davis for cause, although he later exercise a peremptory challenge to strike her from the panel. The record does not provide a basis for concluding that the prosecutor's challenge to Ms. Davis was a mere pretext for discrimination.

Similarly, the prosecutor's reasons for striking venirepersons Coleman, Albert Smith, Lindsey, Thelma Prince, and White were based upon proper trial considerations. The purpose of peremptory challenges is to exclude those jurors for a "real or imagined partiality that is less easily designated or demonstrable" than challenges for cause. *See, Swain*, 380 U.S. at 220. Here, the prosecutor was able to assess the credibility and demeanor of the venirepersons. Ms. Coleman indicated that she had some reservations about the fairness of a police lineup for identification of a suspect who allegedly snatched her purse. This was a significant factor in light of the prosecution's intention to present identification testimony during the trial. Additionally, on the basis of his observations, the prosecutor found Albert Smith's answers unsatisfactory and he sensed hostility on the part of Thelma Prince during the voir dire examination. Also, it does not appear from the record that Ms. Lindsey or Mr. White answered any questions despite the lengthy voir dire examination. On the basis of the record before the Court, it cannot be said that exclusion of these jurors was beyond the range of discretion for exercising peremptory challenges. *Weathersby*

v. Morris, 708 F.2d 1493, 1496-1497 (9th Cir. 1983), *cert. denied*, 464 U.S. 1046 (1984) (not constitutionally impermissible for prosecutor to exercise peremptory challenges to venirepersons who gave evasive answers to questions where prosecutor able to assess credibility and demeanor of witnesses); *United States v. Campbell*, 766 F.2d 26 (1st Cir. 1985) (challenge to black venireperson based upon his "demeanor", "intangible factors", and "vibrations" supported finding that challenge not racially motivated); *United States v. Forbes*, 816 F.2d 1006 (5th Cir. 1987) (peremptory challenge to black venireperson because posture and demeanor on voir dire indicated to the prosecution that she was hostile was based upon racially neutral factor).

Venireperson Kirkman was struck because he was related, by marriage, to a former assistant circuit attorney. The reason given by the prosecutor is sufficient given the "former" employment status of the assistant circuit attorney and the possibility of preconceptions Mr. Kirkman may have had about the office of the circuit attorney.

Venirepersons Burnett, Greene, and Ellis were struck because the prosecutor, based on his experience, believed that nurses or those in the nursing profession tended to give people a second chance. While this may have been a proper trial related consideration, the undersigned notes that the prosecutor failed to challenge two presumably white venirepersons, Bursatti and Hacker, who were also in the nursing profession.

Venireperson Bursatti worked in an airport first aid station, providing medical assistance to sick passengers and in the event of disaster. She stated that she spent her spare time at work "chatting" with the airport police. (Resp. Exh. A at 127-128). Venireperson Hacker was a student-nurse who also held a job in a restaurant and who liked "being around people." It does not appear from the record whether she was currently employed by a hospital. (Resp. Exh. A, 147-148). Venireperson Ellis stated that she worked at a facility that provided private care for the sick and disabled. (Resp. Exh. A at 216). While the record of the voir dire examination does not affirmatively reveal that venirepersons Burnett and Greene were, in fact, nurses defense counsel made no objection to their characterization as such. (Resp.

Exh. A at 398-399). It is, however, evident from the record that despite the similarity of their vocations, only the black venire- persons who worked in the nursing profession were struck from the panel. If, as the prosecutor asserted, those involved in nursing tend to be sympathetic to the defense, then this tendency would seem to apply regardless of race. Aside from the fact that venireperson Bursatti enjoyed a pleasant relationship with the airport police, the undersigned can discern from the record no valid reason for the difference in treatment accorded to Greene, Ellis, and Burnett.

Similarly, the proffered reasons for striking black venirepersons Shavers and Brown are not supported by the record. Ms. Shavers' relationship with a family friend who had been convicted and imprisoned for selling drugs and Mr. Brown's relationship with a nephew who was awaiting trial on an accessory to murder charge did not make them unique among the remaining venirepersons. In fact, several white jurors stated that they, too, had friends and relatives who had been convicted of crimes and, in some cases, crimes that were similar to those charged against the petitioner. Specifically, the record reveals that venireperson Gibson's son had previously been convicted of burglary and was facing a then-pending charge of receiving stolen property. Venireperson Barton's husband had been convicted of burglary and venireperson Hickey's friend had been convicted of an offense involving the use of a knife. Additionally, venireperson Gremminger knew a man who had been prosecuted for selling drugs and a nephew of venireperson Rogers had served time for an unspecified offense. (Resp. Exh. A at 99-104).

The black venirepersons, like their white counterparts, stated that they could remain impartial despite their relationship with persons who had been involved in criminal activity. Furthermore, venireperson Shavers indicated a possible bias in favor of the prosecution by stating that she knew her friend was guilty even though she had not discussed the charge with him. (Resp. Exh. A at 140-141). Although Brown's and Shavers' relationship with persons charged or convicted of crimes was a factor that the prosecutor deemed significant, the similar relationship of white venirepersons was not deemed equally significant.

Finally, in his affidavit, the prosecutor states that venireperson Frederick Prince was struck because he knew an associate circuit judge and because he was familiar with guns. The record reveals that Mr. Prince was a neighbor of an associate circuit judge. (Resp. Exh. A at 64). While this may be an acceptable trial related concern in and of itself, the record further reveals that the prosecutor did not strike venireperson Moore, who is white, even though she stated that she knew the judge who was presiding over petitioner's trial. (Resp. Exh. A at 64). This troubling circumstance is compounded by the fact that the prosecutor objected to defense counsel's motion to strike Ms. Moore for cause because she knew the judge and because she may have also known some of the witnesses in the case. (Resp. Exh. A at 116). The prosecutor's second reason for striking Mr. Prince is not at all supported by the record. The only evidence in the record that even comes close to supporting the prosecutor's statement that Mr. Prince was familiar with guns is Mr. Prince's testimony that he had been the victim of an armed robbery. (Resp. Exh. A at 83). Additionally, it is noted that white venirepersons who had also been victims of armed robbery were not struck by the prosecutor. (Resp. Exh. A at 153). It would appear to the undersigned that the experiences of Mr. Prince and other venirepersons as victims of a crime similar to one that the petitioner was accused of would redound to the prosecutor's benefit.

Having found that the prosecutor's reasons for striking black venirepersons Greene, Brown, Burnett, Ellis, Shavers and Frederick Prince are unsupported by the record and appear to be no more than pretexts for discrimination, the question becomes whether the use of less than a majority of available peremptory challenges to strike venirepersons for discriminatory reasons constitutes a violation of petitioner's Fourteenth Amendment rights. At first blush, *Swain* appears to hold that only the *systematic* exclusion of black venirepersons constitutes a violation of a defendant's Fourteenth Amendment rights.[3]

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[3] It is clear that under *Batson* a single act of invidious discrimination is inconsistent with the promise of equal protection to all. *Batson*, 476 U.S. at 95-96. *See also, United States v. Battle*, 836 F.2d 1084 (8th Cir. 1987); *United*

The undersigned, however, does not read *Swain* so narrowly as to hold that the *systematic* exclusion of blacks is the measure of an individual's constitutional rights. *Swain* clearly held that a state's purposeful or deliberate denial of participation as a juror on account of race violates the Equal Protection Clause. *Swain*, 380 U.S. at 203-204. *Swain* only enunciates the systematic exclusion doctrine in the context of the burden of proof necessary to overcome the presumption of propriety of peremptory challenges given the valued position these challenges hold in our jurisprudence. However, the presumption dissipates when reasons for challenges are volunteered, and the stringent burden of proof of showing a systematic exclusion is no longer necessary. Thus, once the reasons for peremptory challenges are volunteered, a finding of exclusion of one or more venirepersons for discriminatory reasons constitutes a violation of the equal protection clause of the Fourteenth Amendment.

Although the undersigned concludes that petitioner's Fourteenth Amendment right of equal protection was violated by the exclusion of black venirepersons for apparently discriminatory reasons, it does not follow that petitioner must be immediately released from incarceration. Rather, the State of Missouri should first be given a reasonable amount of time in which to correct the constitutional violation that occurred in petitioner's first trial. *Hilton v. Braunskill*, ___ U.S. ___, 107 S.Ct. 2113 (1987).

RECOMMENDATION

For the foregoing reasons, it is recommended that petitioner's application for a writ of habeas corpus be conditionally granted with the writ to issue in the event that the State of Missouri fails to begin proceedings to retry petitioner for the crimes charged within a reasonable time after the district court's final determination. It is further

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footnote 3 continued

States v. David, 803 F.2d 1567, 1571 (11th Cir. 1986) (under *Batson*, striking of one black juror for racial reason violates the equal protection clause even where other black jurors are seated and even when valid reasons for striking of some black jurors are shown).

recommended that the petitioner's motion for summary judgment and motion for appointment of counsel be denied. The parties are advised that they have eleven (11) days in which to file written objections to this report and recommendation.

/s/ Carol E. Jackson
CAROL E. JACKSON
UNITED STATES MAGISTRATE

Dated this 10th day of November, 1988.

APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 87-1510 C (2)

DAVID E. WALTON,
Petitioner,

v.

MYRNA TRICKEY,
Respondent.

MEMORANDUM AND ORDER

This matter is before the Court on David E. Walton's petition for habeas corpus relief and motion for appointment of counsel. The matter was referred to United States Magistrate Carol E. Jackson, who has filed her Report and Recommendation. 28 U.S.C. § 636. Walton has filed objections thereto.

In his objections, petitioner relies on the recent case of *Garrett v. Morris*, 815 F.2d 509 (8th Cir.), *cert. denied*, 108 S.Ct. 233 (1987). Because the Court finds that the case conflicts with portions of the Magistrate's Report and Recommendation, we decline to adopt such Recommendation in full at this time.

Petitioner was convicted in the Circuit Court for the City of Saint Louis in 1984 of first degree robbery, first degree tampering, and armed criminal action. He was sentenced to concurrent terms of imprisonment of fifteen years on the robbery charge and ten years on the tampering charge, followed by a consecutive five-year term on the armed criminal action charge. On appeal, petitioner argued that his Sixth Amendment right to fair trial was violated when the prosecution used its peremptory challenges to strike black members of the venire panel. This argument was rejected by the Missouri Court of Appeals based on *Swain v. Alabama*, 380 U.S. 202 (1965). *State v. Walton*, 703 S.W.2d 540 (Mo. App. 1986).

Petitioner then moved to recall the mandate in light of the United States Superme[sic] Court's decision in *Batson v. Kentucky*, 476 U.S. ___, 106 S.Ct. 1712 (1986). In this motion, petitioner argued that his Fourteenth Amendment right of equal protection also was violated by the prosecutor's actions, and that *Batson* would have applied to this case if his attorney had filed for certiorari from the appellate court's decision. The court denied petitioner's motion in *State v. Walton*, No. 49171 (Mo. App., E.D., May 28, 1987).

In the Report and Recommendation, Magistrate Jackson found that petitioner exhausted his remedies by raising the Sixth Amendment claim in his direct appeal and the equal protection claim in his motion to recall the mandate. *See Graham v. Solem*, 728 F.2d 1533 (8th Cir.), *cert. denied*, 469 U.S. 842 (1984). The Court agrees with the Magistrate's finding of exhaustion, and adopts her Report and Recommendation to that extent. The Court, however, disagrees with the recommendation to dismiss the habeas petition at this time, for the following reasons.

According to the record of petitioner's state court trial, after voir dire the prosecuting attorney exercised all fourteen of his peremptory challenges to strike black venirepersons. As a result, petitioner's jury panel consisted of twelve white persons and one black alternate. At that time, petitioner's counsel moved for a mistrial based on the jury composition, which was denied. This argument also served as the basis for petitioner's motion for a new trial, which was also denied.

At the time of petitioner's state trial in 1984, case law provided that in order to succeed in constitutional challenges to jury composition based on racial discrimination, one was required to show that the prosecutor engaged in "a systematic use of peremptory challenges against Negroes over a period of time." *Swain*, 380 U.S. at 227. This standard was significantly changed in *Batson, supra*, where the court held that one may establish a prima facie case of racial discrimination in violation of equal protection by showing that a prosecutor *in a given case* used peremptory challenges to strike blacks from the venire. *Batson*, however, does not apply retroactively on collateral review of convictions, such as petitioner's, that became final before *Batson* was

announced, *Allen v. Hardy*, 478 U.S. ___, 106 S.Ct. 2878 (1986); and, therefore, the Magistrate relied on the standard of *Swain* when reviewing the petitioner's claims in this case.

The Magistrate in this case found that petitioner failed to establish that the prosecutor in his state trial "consistently and systematically" exercised peremptory challenges to exclude blacks from jury panels in criminal cases. *Swain*, 380 U.S. at 223. Rather petitioner merely established that all blacks were excluded from the jury panel *in his particular trial.* The Magistrate then rejected both the Sixth and Fourteenth Amendment attacks on petitioner's conviction.

However, in *Garrett v. Morris, supra*, the court recently held that when a prosecutor volunteers reasons for his use of peremptory challenges, the *Swain* presumption of correctness falls, and the court should review his motives "to determine whether the purposes of the peremptory challenge are being perverted." 815 F.2d at 513. The court distinguished the situation from *Swain* as follows:

> [c]ases where the prosecutor at trial volunteers his or her reasons for using peremptory challenges to exclude from the petit jury an identifiable group, present a situation distinguishable from *Swain*. In such cases, the court does not conduct the type of inquiry barred by *Swain*. The prosecutor's motives have been voluntarily put on the record and the prosecutor can no longer be cloaked by the presumption of correctness. Our reading of *Swain*, convinces us that in such circumstances a court need not blind itself to the obvious and the court may review the prosecutor's motives to determine whether "the purposes of the peremptory challenge are being perverted," *Swain*, 380 U.S. at 224, 85 S.Ct. at 838, by excluding an identifiable group "from juries for reasons wholly unrelated to the outcome of the particular case on trial."

Id. at 512. Once the reasons were voluntarily set forth in the record by the prosecutor, the court in *Garrett* then examined his reasons for using the peremptory challenges to determine their legitimacy. In *Garrett*, the court found the reasons pretextual and unsupported by the record and ordered the state to grant the petitioner's writ for habeas corpus relief or begin new trial proceedings. *Id.* at 514.

In this case, after having examined the record of the state trial proceedings, the Court finds that the prosecutor did volunteer his reasons for using peremptory challenges, and entered those reasons into the record. At the close of the state's case against the petitioner, the prosecutor stated (in the company of defense counsel, the judge, and the court reporter) as follows:

> Your Honor, at this time, I wish to make a record with reference to the original request for a mistrial at the close of the voir dire examination. Certain arguments and references were made as to peremptory strikes made by the State. I at this time renew my objection as to any sort of inquiry as to the peremptory strikes or as to why certain peremptory strikes were made.
>
> However, for the record, I would state that . . . .

(*State v. Hamilton and Walton*, Nos. 841-00008A, 841-00008B, Transcript, p. 396.) The prosecutor then listed each of the twelve black venirepersons by name, along with the reasons he exercised his peremptory challenges to strike each one.

The Court finds this situation within the holding of *Garrett*. The Court also finds that even though the prosecutor indicated an objection to such an inquiry, such objection does not affect the applicability of *Garrett* or the characterization of his actions as "voluntary" within the meaning of that case. The court in *Garrett* noted that it had previously "considered a prosecutor's reasons for excluding blacks even where those reasons were offered in response to an inquiry by the court," citing *United States v. Andrade*, 788 F.2d 521 (8th Cir.), *cert. denied*, 107 S.Ct. 462 (1986). *Garrett*, 815 F.2d at 513.

Therefore, the Court finds that petitioner's failure to demonstrate that the prosecutor "consistently and systematically" exercised peremptory challenges to prevent blacks from serving on criminal juries is not fatal to his Fourteenth Amendment challenge, where the prosecutor volunteered his reasons for using the peremptory strikes. The Court, however, does not find support for petitioner's Sixth Amendment challenge, in that there is no Sixth Amendment exception to the equal protection analysis of *Swain*. *See Garrett*, 815 F.2d at 511 n.2.

The Court will thus review the prosecutor's motives in light of the equal protection challenge to determine if the exclusions were related to the outcome of the case on trial.

In his objections, petitioner requests an evidentiary hearing in light of *Garrett*. This Court will not rule on that request, but will refer this case back to the Magistrate for further consideration in accordance with *Garrett*. The Court also refers back to the Magistrate petitioner's request for the appointment of counsel.

Accordingly,

IT IS HEREBY ORDERED that the Report and Recommendation of the United States Magistrate is SUSTAINED and ADOPTED only to the extent that it finds that the petitioner has exhausted his state court remedies.

IT IS FURTHER ORDERED that this matter is referred back to United States Magistrate Carol E. Jackson for further consideration in accordance with *Garrett v. Morris*, 815 F.2d 509 (8th Cir. 1987).

Dated this 13th day of April, 1988.

/s/ Edward L. Filippine
UNITED STATES DISTRICT JUDGE

APPENDIX I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 87-1510 C (2)

DAVID E. WALTON,
Petitioner,

v.

MYRNA TRICKEY,[1]
Respondent.

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE

Before the Court is the petition of David E. Walton for a writ of habeas corpus under 28 U.S.C. §2254 and the petitioner's motion for appointment of counsel. This matter was referred to the undersigned United States Magistrate for a report and recommended disposition pursuant to 28 U.S.C. §636(b).

In 1984 a jury in the Circuit Court of the City of St. Louis, Missouri found Walton guilty of robbery first degree, tampering first degree and armed criminal action. He was sentenced to concurrent terms of imprisonment of fifteen years on the robbery charge and ten years on the tampering charge, to be followed by a consecutive five-year term of imprisonment on the armed criminal action charge.

On appeal, Walton asserted that the prosecution's use of peremptory challenges to remove black members of the venire panel constituted a violation of his Sixth Amendment right to a jury selected from a fair cross-section of the community. The Missouri Court of Appeals, however, rejected Walton's argument on the grounds that he had not

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[1] Because the petitioner is attacking a sentence to be served in the future, William Webster, Attorney General of the State of Missouri should be added as a party respondent. 28 U.S.C. §2254, Rule 2(b).

shown a pattern of systematic exclusion of black venirepersons as required by *Swain v. Alabama*, 380 U.S. 202 (1965) and Missouri case law, and Walton's conviction and sentence were affirmed on appeal. *State v. Walton*, 703 S.W.2d 540 (Mo. App. 1985). (Resp. Exh. E). Thereafter, Walton filed a motion to recall the mandate and supplemental motion to recall mandate seeking a remand of the case for a new trial in light of the United States Supreme Court's decision in *Batson v. Kentucky*, 476 U.S. ___, 106 S. Ct. 1712 (1986) which held that a prosecutor's use of peremptory challenges to strike blacks from the jury may violate the equal protection clause of the Fourteenth Amendment. In his motions, Walton argued that the *Batson* decision applied retroactively and would have applied in his case but for the fact that his attorney on direct appeal failed to file a petition for certiorari to the United States Supreme Court. The Missouri Court of Appeals summarily denied petitioner's motions to recall the mandate. *State v. Walton*, No. 49171, (Mo. App., E.D., May 28, 1987).

Petitioner filed the instant petition for a writ of habeas corpus on August 17, 1987. In his first ground for relief, Walton asserts that the prosecutor's use of peremptory challenges to exclude blacks from the jury panel during his criminal trial violated his rights under the equal protection clause of the Fourteenth Amendment. His second ground for relief is that the prosecutor's peremptory challenges of black venirepersons operated to deprive him of his Sixth Amendment right to a jury composed of a fair cross-section of the community. The respondent argues that Walton failed to exhaust available state remedies with respect to his first ground for relief. The undersigned disagrees.

Exhaustion of available state remedies is a prerequisite to seeking habeas relief under 28 U.S.C. §2254. Thus, a petitioner must present the substance of his federal constitutional claims to the state courts and afford those courts full and fair opportunity to apply controlling legal principles to the facts bearing on his constitutional claims. *Anderson v. Harless*, 459 U.S. 4 (1982). It is not necessary that the state courts rule on the merits of petitioner's claims, as the exhaustion requirement is satisfied if the state courts have been fairly presented with the

opportunity to do so. A petitioner fairly presents the substance of his federal constitutional claims to the state courts by citation to a federal statute, a provision of the United States Constitution, a federal or state case raising a federal constitutional issue, or by making a discernible reference to a federal constitutional right. *Graham v. Solem*, 728 F.2d 1533 (8th Cir.), *cert. denied*, 469 U.S. 842 (1984).

The discriminatory jury selection claim that Walton raised in the direct appeal of his conviction was premised on due process and Sixth Amendment grounds—not on equal protection grounds. (See Resp. Exh. C, p.20). However, in his motion and supplemental motion to recall the mandate, Walton argued that his jury selection claim should have been accorded equal protection analysis in accordance with the standard established in *Batson* and that he would have received the benefit of such analysis but for his attorney's failure to petition for certiorari to the United States Supreme Court. Walton's argument was presented in the context of a claim of denial of effective assistance of appellate counsel, a claim that is properly raised in a motion to recall the mandate. *See, State v. Thompson*, 659 S.W.2d 766, 769 (Mo. banc 1983). Nevertheless, even in that context, the Missouri Court of Appeals could have considered the equal protection claim Walton now asserts in his habeas corpus petition. Moreover, any further attempt at state court review would be futile, as the Missouri courts have held that *Batson* does not apply retroactively to cases which were not on direct review when *Batson* was decided. *Thomas v. State*, 736 S.W.2d 518 (Mo. App. 1987); *See also, Scott v. State*, No. 39098 (Mo. App. W.D. Oct. 8, 1987).

Turning now to the merits of Walton's claims, the record before the Court reveals that at the conclusion of the voir dire examination, the prosecuting attorney exercised all of his fourteen peremptory challenges to strike black venirepersons. As a result, the jury was comprised of twelve white jurors and one black alternate juror. Defense counsel moved for a mistrial and the matter was argued to the court. In support of his motion, defense counsel pointed to the fact that the prosecuting attorney's peremptory challenges were directed only to black venirepersons and argued that the prosecutor's exercise of the challenges

in this fashion was for the purpose of achieving an all-white jury. Defense counsel offered no further argument or evidence, and the motion for a mistrial was overruled. (Resp. Exh. A, pp. 219-226). Thereafter, Walton filed a motion for new trial asserting, *inter alia*, that the trial court erred in denying his motion for a mistrial based on the prosecution's striking of blacks from the venire. The motion for new trial was also overruled. (Resp. Exh. B, pp. 12, 17-20). On appeal, Walton challenged the exclusion of blacks from his jury as a violation of his Sixth Amendment right to a jury selected from a fair cross-section of the community. The Missouri Court of Appeals, however, found that Walton had not attempted to make the requisite showing that the prosecution, in case after case, had systematically excluded black jurors through the use of peremptory challenges.

Walton's claim of discriminatory jury selection set forth in his instant habeas petition is premised in part on *Batson v. Kentucky, supra*, which held that a prima facie case of racial discrimination in violation of the equal protection clause could be established by showing that a prosecutor in a given case had used peremptory challenges to strike blacks from the venire. The *Batson* decision overruled the strict standard established by *Swain v. Alabama*, 380 U.S. 202 (1965) which required a defendant to establish that the prosecutor had engaged in a pattern of challenging black jurors in a series of cases. *Id.* at 223-224. However, *Batson*, does not apply retroactively on collateral review of convictions that became final before the *Batson* opinion was announced. *Allen v. Hardy*, 478 U.S. ___, 106 S. Ct. 2878 (1986). The Court has defined "final" to mean cases in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed. *Id.* at 2880, f.n. 1. Thus, in *Hardy* the Court held that the *Batson* rule should not be applied to a petitioner on federal habeas corpus review of his conviction. *Id.* at 2881.

In the instant case, petitioner's direct appeal was denied by the state court on December 17, 1985, his motion for rehearing and/or transfer was denied on January 21, 1986, and his application for transfer to the Missouri Supreme Court was denied on February 18, 1986. Walton

did not petition for a writ of certiorari to the United States Supreme Court and the time allowed for doing so had expired by April 30, 1986, the date of the *Batson* ruling. U.S. Sup. Ct. R. 20.1.

Thus, the rule announced in *Batson* is not applicable here and Walton's equal protection claim must be analyzed instead under the standard established in *Swain v. Alabama*, 380 U.S. 202 (1965). In that case, the Court ruled that the use of peremptory challenges to strike prospective black jurors in a particular case does not constitute a denial of equal protection of the laws. *Id.* at 221-222. Rather under *Swain*, a defendant, in order to establish a prima facie case of racial discrimination in violation of the Fourteenth Amendment, must show that the prosecutor "consistently and systematically" exercised peremptory challenges to prevent blacks from serving on juries in criminal cases. *Id.* at 223.

In the present case, the Missouri Court of Appeals found that Walton had not even attempted to show systematic racial discrimination in the selection of the jury. The undersigned has reviewed the record of the proceedings before the trial court, and concludes that this factual determination made by the state appellate court is fully and fairly supported by the record. *See, Sumner v. Mata*, 449 U.S. 539 (1981). Walton neither alleged nor did he offer any testimony or other evidence showing that the prosecuting attorney, "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be," was responsible for striking black venirepersons such that blacks were prevented from serving on petit juries. *Swain v. Alabama*, 380 U.S. at 223. At best, Walton established that all blacks were stricken from the venire at his trial. Such proof, however, is insufficient to establish a denial of equal protection.

With respect to Walton's second claim, that the absence of black jurors operated to deny him a fair trial, there is no Sixth Amendment exception to the holding in *Swain*. *United States v. Thompson*, 730 F.2d 82 (8th Cir. 1984); *United States v. Childress*, 715 F.2d 1313 (8th Cir. 1983) (en banc), *cert. denied*, 464 U.S. 1063 (1984); *see also, McCray v. New York*, 461 U.S. 961 (1983) (mem.). Thus, the fact that a prosecutor used peremptory challenges to strike prospective black

jurors in a particular case is insufficient to establish a Sixth Amendment violation. *United States v. Childress, supra.* Accordingly, Walton should be denied relief on the claims asserted in his petition.

Finally, Walton has filed a motion for appointment of counsel. Proceedings for federal habeas corpus relief are civil in nature and, as such, a petitioner has no Sixth Amendment right to appointment of counsel. *Watson v. Moss*, 619 F.2d 775 (8th Cir. 1980); *Norris v. Wainwright*, 588 F.2d 130 (5th Cir.), *cert. denied*, 444 U.S. 846 (1979). As discussed above, the grounds Walton asserts do not warrant relief under 28 U.S.C. §2254 and his petition should be dismissed. The interests of justice would not be served by appointing counsel and, therefore, Walton's motion should be denied.

RECOMMENDATION

For the foregoing reasons, it is hereby recommended that the petition of David E. Walton for a writ of habeas corpus be dismissed and that the petitioner's motion for appointment of counsel should be denied. The parties are advised that they have ten (10) days in which to file written objections.

/s/ Carol E. Jackson
CAROL E. JACKSON
UNITED STATES MAGISTRATE

Dated this 18th day of December, 1987.

APPENDIX J

PETITION UNDER 28 USC § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

AO 241
REV 6/82
UNITED STATES DISTRICT COURT
DISTRICT: Eastern District of Missouri
Name: David E. Walton
Prisoner No.: #151492
Docket No.: 87-1510-C-2
Place of Confinement: Missouri Eastern Correctional Center, Pacific, Missouri
Name of Petitioner (include name upon which convicted):
DAVID E. WALTON
Name of Respondent (authorized person having custody of petitioner):
MYRNA TRICKEY, Superintendent
The Attorney General of the State of:
Missouri

PETITION

1. Name and location of court which entered the judgment of conviction under attack: Circuit Court, St. Louis City, 1320 Market Street, St. Louis, MO 63103

2. Date of judgment of conviction: 1984

3. Length of sentence: Fifteen; ten; and five years respectively.

4. Nature of offense involved (all counts): Robbery First Degree; Tampering First Degree; and Armed Criminal Action.

5. What was your plea? (Check one)

(a) Not guilty (X)
(b) Guilty ( )
(c) Nolo contendere ( )

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: N/A

6. Kind of trial. (Check one)

(a) Jury (X)
(b) Judge only ( )

7. Did you testify at the trial?

Yes (X) No ( )

8. Did you appeal from the judgment of conviction?

Yes (X) No ( )

9. If you did appeal, answer the following:

(a) Name of court: Missouri Court of Appeals, E.D.; Missouri Supreme Court
(b) Result: Convictions Affirmed; Application to Transfer Denied
(c) Date of result: December 17, 1985 and February 18, 1986
(d) Grounds raised: Same as raised herein.

10.Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?

Yes ( ) No (X)

11. If your answer to 10 was "yes," give the following information:

(a)(1) Name of court: N/A
(2) Nature of proceeding:
(3) Grounds raised:
(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ( ) No ( )

(5) Result:
(6) Date of result:

(b) As to any second petition, application or motion give the same information:

(1) Name of court:
(2) Nature of proceeding:
(3) Grounds raised:
(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ( ) No ( )

(5) Result:
(6) Date of result:

(c) As to any third petition, application or motion, give the same information:
(1) Name of court:
(2) Nature of proceeding:
(3) Grounds raised:
(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ( ) No ( )

(5) Result:
(6) Date of result:

(d) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ( ) No ( )
(2) Second petition, etc. Yes ( ) No ( )
(3) Third petition, etc. Yes ( ) No ( )

(e) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: *In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to*

set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

See Attached Sheets.

B. GROUND ONE:

Supporting FACTS (tell your story briefly without citing cases or law);

GROUND TWO:

Supporting FACTS (tell your story briefly withoyt[sic] citing cases or law):

SUPPLEMENTAL SHEET

A. *Ground One:* Petitioner was denied equal protection of the law in contravention of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because the State trial court erred by overruling petitioner's motion for a new trial and request for a new venire panel which was made after the State prosecutor used all of his fourteen (14) peremptory strikes to purposefully remove members of petitioner's race (black race) from the venire panel; and this action denied petitioner a jury selected from a fair cross-section of the community in that members of a distinct group were systematically removed in this manner and no sufficient reasons appeared, *although the State prosecutor made the reasons for his actions a part of the record*, to contradict the obvious fact that they were excluded solely on the basis of race; and the State failed to rebut petitioner's prima facie case of racial discrimination.

Supporting FACTS: The state court record will show that petitioner was tried with a codefendant, and the state prosecutor used "all" fourteen of its peremptory strikes to remove black veniremen from petitioner's jury panel. The record will also show that petitioner's trial counsel made a timely objection to the state prosecutor's use of his peremptory strikes to remove only black veniremen, and defense counsel moved for a mistrial and requested a new venire panel. Thereafter, the state prosecutor volunteered the reasons for his actions of excluding only black veniremen and made them part of the record.

C. Ground three:

Supporting FACTS (tell your story *briefly* without citing cases or law):

D. Ground four:

Supporting FACTS (tell your story *briefly* without citing cases or law):

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: N/A

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?
Yes ( ) No (X)

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing: N/A
(b) At arraignment and plea: St. Louis Public Defender's Office
(c) At trial: Same as above
(d) At sentencing: Same as above
(e) On appeal: Henry Robertson, St. Louis, Missouri
(f) In any post-conviction proceeding: N/A
(g) On appeal from any adverse ruling in a post-conviction proceeding: N/A

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?
Yes (X) No ( )

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes ( ) No (X)

(a) If so, give name and location of court which imposed sentence to be served in the future: N/A
(b) Give date and length of the above sentence: N/A

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes ( ) No ( ) N/A

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding

Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 29th, '87.

/s/ David Walton
Signature of Petitioner

APPENDIX K

STATE of Missouri, Respondent,

v.

David Earl WALTON, Appellant.

No. 49171.

Missouri Court of Appeals,
Eastern District,
Division Two.

Dec. 17, 1985.

Motion for Rehearing and/or Transfer
Denied Jan. 21, 1986.

Application to Transfer Denied
Feb. 18, 1986.

Defendant was convicted in the Circuit Court, St. Louis City, Edward M. Peek, J., of first-degree robbery, first-degree tampering and armed criminal action, and he appealed. The Court of Appeals, Crist, J., held that: (1) the trial court did not abuse its discretion in denying challenges for cause to two venirepersons who were related to police officers; (2) the defendant was not entitled to a mistrial for the prosecution's use of its peremptory challenges against black members of the venire panel; and (3) the error in omitting the word "knowingly" from the verdict directing instruction on the offense of tampering with an automobile was not plain error.

Affirmed.

1. Jury 97(2, 4)

Two venirepersons' relationships with police officers were not sufficient to mandate granting challenges for cause where answers given by venirepersons on voir dire left little doubt as to their qualifications to be jurors, and there was no indication that either venireperson would believe police officer's testimony simply because he was an officer.

2. Jury 149

Defendant did not make requisite showing that prosecutor's use of peremptory challenges to remove black members of venire panel amounted to systematic exclusion and, therefore, defendant was not entitled to mistrial and impaneling of new jury. U.S.C.A. Const. Amend. 6.

3. Automobiles 339

Offense of tampering with automobile in first degree has knowledge element. V.A.M.R. 29.12(b); V.A.M.S. §§ 569.080, 569.080, subd. 2, 569.090, subd. 1(2); MAI Criminal 2d No. 23.21.

4. Criminal Law 1038.1(4)

Error in omitting word "knowingly" in verdict directing instruction in prosecution for tampering with automobile in first degree did not result in manifest injustice or miscarriage of justice so as to warrant relief for plain error where there was no hint that defendant was operating under misapprehension that he had permission to operate victim's automobile. V.A.M.R. 29.12(b); V.A.M.S. §§ 569.080, 569.080, subd. 2, 569.090, subd. 1(2); MAI Criminal 2d No. 23.21.

Henry Robertson, St. Louis, for appellant.

William L. Webster, Carrie Francke, Jefferson City, for respondent.

CRIST, Judge.

Appeal from jury convictions for robbery in the first degree, tampering in the first degree, and armed criminal action, for which defendant was sentenced by the court, as a prior and persistent offender, to fifteen years' imprisonment on the robbery count, a concurrent sentence of ten years' imprisonment on the tampering count, and a consecutive term of five years' imprisonment for armed criminal action. We affirm.

As sufficiency of the evidence is not challenged, the facts may be stated briefly. On January 2, 1984, at approximately 1:45 p.m., the victim parked his car in the parking lot of a drug store at the intersection of Manchester and McCausland in the City of St. Louis. He exited and locked the car, and prepared to cross Manchester Road. As he did so, a black male, later identified as co-defendant Sidney Hamilton, came out of a bus shelter, took a gun out of a paper bag, and ordered victim to surrender his money and car keys. Another black male, later identified as defendant, then left the shelter, took the keys, and started victim's car. Victim gave his money to Hamilton as ordered, but refused an order to enter the car and walked away. He observed defendant and Hamilton drive his car to the East on Manchester, then called the police.

He described the car and the two men to the police dispatcher, who apparently put out a bulletin on the police radio concerning the crime. Two police officers spotted a car matching the description given by defendant[sic], being driven by two black males who also matched the description given by defendant[sic], in the area of Kingshighway and Oakland. The car was stopped and the occupants were arrested. Victim was taken to the scene of the arrest, where he identified the two men as his assailants. A Swiss army knife usually kept in the glove department of victim's car, money and a gun were found on the occupants upon their arrest.

[1] Defendant first challenges the composition of the jury panel, claiming two venirepersons should have been stricken for cause because of their relationships with police officers. Venireperson Scheetz was the daughter of a Lieutenant Colonel in the St. Louis City police force. Two of her brothers, one a detective and another an officer, were also on that force. Venireperson Moore was the wife of a sergeant on the St. Louis City Police force who was in charge of the Evidence Technician Unit. She had heard of one officer who testified at the trial, as a person who worked for her husband, and she had met another testifying officer through the Police Association. Both venirepersons were challenged for cause, but the challenges were overruled by the trial court.

A defendant is entitled to a fully qualified panel of potential jurors from which to exercise his peremptory challenges. But, a trial court is vested with considerable discretion in determining the qualifications of a potential juror, and a ruling on a challenge for cause will only be disturbed upon a showing of a clear abuse of discretion. *State v. Leipus*, 675 S.W.2d 896, 898[1-3] (Mo. App. 1984). No such abuse is shown here.

A relationship with police officers is not sufficient, standing alone, to disqualify a juror. *State v. Hemphill*, 669 S.W.2d 633, 635 (Mo. App. 1984). The answers given by the challenged venirepersons on voir dire leave little doubt as to their qualifications to be jurors. There was no initial equivocation on the matter of whether they would consider testimony by policy officers as superior to or more trustworthy than evidence or testimony by non-police officers. *Compare, e.g., State v. Miller*, 655 S.W.2d 797, 798-99 (Mo. App. 1983). Both venirepersons denied contact with their relatives concerning police work. Moore stated she and her husband agreed he would not tell her about his work unless there was something amusing. Scheetz testified she did not get a lot of "war stories" from her brothers (who did not live at home) or her father.

More importantly, there was no indication either venireperson would believe a police officer's testimony simply because he was an officer. Scheetz stated she could be fair to both sides in the case, and nothing in the record suggests the contrary. Moore indicated should would automatically believe her husband, but not other officers; she succinctly stated "I'm married to a policeman, but I'm not married to the police department." No abuse of the trial court's discretion appears in this matter.

[2] Defendant also asserts the trial court erred in overruling defendant's motion to declare a mistrial and empanel a new jury due to the prosecution's use of its peremptory challenges to remove the black members of the venire panel, claiming this violated his rights under the Sixth Amendment to a jury selected from a fair cross-section of the community. He argues for the adoption of the approach contained in such cases as *Commonwealth v. Soares*, 387 N.E.2d 499

(Mass. 1979) and *People v. Wheeler*, 22 Cal.3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978). Missouri rejects this approach, *State v. Sims*, 639 S.W.2d 105, 108-09 (Mo. App. 1982), and requires the claimant to show systematic exclusion by a prosecutor, in case after case, of blacks as trial jurors by use of peremptory challenges. *State v. Hurley*, 680 S.W.2d 209, 212 (Mo. App. 1984); *see Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). Defendant did not attempt to make the requisite showing, and therefore the court did not err in denying the motion. *State v. Jones*, 655 S.W.2d 708, 709 (Mo. App. 1983).

[3] Defendant finally asserts error in the verdict-directing instruction on the offense of tampering in the first degree. It is alleged the instruction improperly submitted to [sic] offense because it omitted the term "knowingly." Recognizing that this point was not preserved for review, defendant requests consideration of the point as plain error under Rule 29.12(b).

Defendant was charged with tampering in the first degree in violation of § 569.080 RSMo (Cum. Supp. 1984), which was passed in 1982. It provides in pertinent part, "A person commits the crime of tampering in the first degree if: . . . (2) He knowingly . . . unlawfully operates an automobile, . . . without the consent of the owner thereof." The state utilized as the verdict directing instruction a modification of MAI-CR2d 23.22.2. This instruction, submitting tampering in the second degree under former § 569.090.1(2), RSMo 1978, did not contain the element of knowledge. A new pattern instruction, containing the element of knowledge, became effective January 1, 1985, after the trial in this case. MAI-CR2d 23.21. Failure to give this instruction is not claimed as error on appeal.

It is apparent defendant's knowledge is an element of the crime of tampering in the first degree. Section 569.080 (2) RSMo (Cum. Supp. 1984). It is also apparent this element was not submitted to the jury in the verdict director, and therefore error was committed. *State v. Krause*, 682 S.W.2d 55, 56 (Mo. App. 1984).

[4] An instructional error is seldom a plain error. *State v. Evans*, 660 S.W.2d 433, 434-35 (Mo. App. 1983). Defendant must go beyond a demonstration of mere prejudice and establish such a misdirection of the jury as would cause manifest injustice or a miscarriage of justice. *State v. Davis*, 675 S.W.2d 652, 657 (Mo. App. 1984). No such misdirection occurred in this case.

There was no real issue concerning defendant's knowledge of the lack of consent of the owner to operate the automobile. It was not claimed victim's car was not taken at gun point; rather, victim's identification of defendant as one of the perpetrators of the crime was the issue raised at trial. There is no hint in the record the perpetrators were laboring under the misapprehension they had permission to operate victim's car. We find no manifest injustice or miscarriage of justice arising from the error of failing to submit to the jury an element of the crime which was not in dispute. *State v. Purk*, 625 S.W.2d 888, 890[2] (Mo. App. 1981); *State v. Miller*, 604 S.W.2d 702, 707-08[7-9] (Mo. App. 1980); *State v. Barber*, 587 S.W.2d 325, 330 [14] (Mo. App. 1979). Therefore, while omission of the element of knowledge was error, it did not result in a manifest injustice or miscarriage of justice so as to warrant relief for plain error under Rule 29.12(b).

Judgment affirmed.

DOWD, P. J., and REINHARD, J., concur.

APPENDIX L

(Excerpt from the Trial Transcript of Mr. Walton's Trial)

(Pages 219-226 and 395-403)

(A jury of 12 and one alternate was selected and seated. The Court excused the jury until 9:00 a.m., Thursday, July 12, 1984. Proceedings were resumed in the courtroom, as follows:)

MR. LANIGAN: Your Honor, I'm not sure what exactly the remedy is here; but I have an objection based on the fact that I think the prosecution used all of its peremptories for the sole purpose of striking every black person from the panel. And I believe that is improper. And I'm not sure how to ask for the remedy, but I believe it would be to discharge this jury and seat another panel and go through voir dire once again.

They struck Mr. Brown who's black; Mr. Kirkman who's black; Rose Coleman who's black; Albert Smith who's black; Clementine Davis, who's black; Frederick Prince is black; Shirley Lindsey who I'm quite sure is black, although I'm not positive; Thelma Prince also black; and Mamie Burnett, also black. Jo Ann Greene, I don't recall her, she's black; and Pamela Shavers who's black; Mr. White who's black—Mr. Harvey White who's black.

MS. PHILLIPS: Leaving, I might add, no black venirepersons from which the defense could choose. In other words, all of the State's strikes removed all of the black people available for the jury. And, further, the State exercised its alternate strikes to strike Ms. Smith who's black; and Ms. Ellis who's black.

MR. MINNICK: Your Honor, I object to this whole matter. First of all, peremptory challenges are simply peremptory challenges. There is a time honored rule of law that peremptory challenges may be made for any reason, for no reason on the part of either party.

Secondly, for a counsel to stand up here in open court and say why I did something, or why the State did something in the case is totally

outside the realm of all the law in this jurisdiction. Now, they don't have any basis to know what I did.

Secondly, there is no evidence that any of these people are, in fact, black. They are just making a big record.

MS. PHILLIPS: For the purpose of the record, well, I think that the rule is that the prosecutor may not systematically exclude people because of their race or their sex or other factors. If Mr. Minnick would state for the record that the people he struck are not all black, then we could make an offer of proof on that matter. I figured that it was an easy matter to make a record in this case because every strike exercised, which was 12 for the panel and 2 for the alternates—since every one of those people that he struck was black, since all of the people who were left in the courtroom are clearly white, and the jury is clearly white, I did not think that we needed to call each venireperson to the bench and make such a record. If Mr. Minnick is denying that he struck 14 people, all of whom are black, that leaving no black people in the courtroom for us to choose from for the 12, then he's disputing what we're saying and we need to make an offer of proof.

THE COURT: As far as I'm concerned, according to my best recollection—and Mr. Minnick is at liberty to correct me if I'm wrong—my recollection is that having looked at the list and having observed the panel, those that the State did strike are of the black race. Now, I don't know that that's enough because I don't know why he struck those.

MS. PHILLIPS: Right, Your Honor. The burden of proof is on us I believe to show systematic exclusion. And we're attempting to make enough of a record for the Court to see that, regardless of what the reasons were, in all 12 cases the result was that 14 people were struck by the State and they are all black, and that left us not a single person to choose from for this jury who was not black. I mean, all of the choices left were of the white race and not of the black race.

Mr. Minnick, do you deny that the 14 people you struck are all black?

MR. MINNICK: Your Honor, I'm not on the witness stand. I'll not answer that question.

THE COURT: As I said, for the record, I'm satisfied that they were. I think the issue is whether or not Mr. Minnick in the exercise of his peremptory rights can do that in a valid fashion for reasons other than race; and I don't know. I know there is some law in other jurisdictions. To the best of my knowledge, there haven't been any cases in Missouri.

MR. MINNICK: There are none.

MS. PHILLIPS: There are cases where this issue has been raised, Your Honor, on appeal. I have just read some in the advance sheets. The burden on the defendant as I understand it is to show that the exclusion was systematic. I can't think of a clearer example than what I am stating to you is [sic] an offer of proof to the Court to be the result here. And that is that of the 12 persons the State struck, all are black.

MR. MINNICK: You have been talking; I think I have a right to say something.

THE COURT: Maybe we can bring this to a conclusion, whatever my person[a]l opinion is concerning the wisdom of doing that for whatever reason, that's another matter. I don't think, though, that I will strike this panel because the prosecutor struck—of his 14 strikes, all 14 were black.

MS. PHILLIPS: Would the Court also agree with my statement that of those persons left for us to choose from on behalf of the defense, not including the alternate, but of the people left for us to choose from, for just the 12 jurors, there was not a single black person to choose from?

THE COURT: I don't recall that, but, certainly, the 12 jurors are white, the alternate is black. Whether those that you struck peremptorily were all white, I can't recall.

MR. MINNICK: Your Honor—

MS. PHILLIPS: I would like to, for the record, state that I kept Myers, Juror No. 5 on the first page, who is white. I'm sorry, "struck" Myers. I struck Brusatti, No. 8 on the first, page who is white. I struck

Scheetz, No. 1 on the second page, who is white. I struck Greer, No. 2 on the second page who is white. I struck Feldmeier, No. 4 on the second page, who is white. And I struck Ms. Moore, No. 6 on the second page, who is white. Those were the strikes that I exercised, except for the alternates[.] And I struck Mister—

MR. MINNICK: May I make a comment at this time?

MS. PHILLIPS: Could we complete—At least let's complete them, complete this list.

MR. LANIGAN: I struck Maxine Mitchell, who I believe is white. I struck Joseph Hickey, who I believe is white. I struck Salvatore Scalise who is white. Also, George Gibson, who is white; and Louise Rogers, who is white; and Ida Schmidt, who is white; and Louise Bolinger, who is—

MS. PHILLIPS: She's white. And that left us with an all white jury. The remedy I would ask the Court for is for a mistrial.

MR. LANIGAN: I would concur, Your Honor, and ask for a new panel.

THE COURT: I'm going to deny the motion for a mistrial. I think the record is sufficient.

MR. MINNICK: Your Honor, now, we have gone through all of this, I would like to make a record. And every one of the persons, as indicated by counsel, struck by the two defense lawyers in this case were white. Secondly, Ms. Phillips, the thrust of her voir dire, I believe the record will indicate was tilted toward and against the white veniremen with the goal of striking them for cause, if at all possible. For instance, Ms. Scheetz, Juror No. 949; Ms. Feldmeier, No. 754; and Ms. Moore, No. 852; all three of which were struck by defense counsel. Additionally, Mr. Gibson, No. 759; and Mr. Rogers, No. 653, also struck by defense counsel. Counsel's questioning, I think the record will indicate, was of a nature such as to exclude white people for cause in this case such that if anyone is trying to get people off the jury it was done during voir dire for the purpose of getting white people off of this panel.

MR. LANIGAN: I would point out that Eileen Scheetz, Dorothy Feldmeyer [sic], and Linda Moore all had friends and family members who were police. And that was, as the record clearly indicates, the subject of our earlier request for striking them for cause.

MS. PHILLIPS: Well, I think, whatever Mr. Minnick wants to say about the strikes that I exercised is pure speculation. Because the point of the matter is I had to make strikes from the choices that I had; and the choices I had were persons of the white race, not of the black race.

MR. MINNICK: The speculation that counsel refers to is no more speculation as to the reasons for which I struck individuals on the original panel, 12 of which happened to be black. There, also, for the record, of the five alternate veniremen available is a black individual. There could have been a white individual of that five left by other counsel. It was not done.

THE COURT: See you tomorrow morning at nine o'clock.

* * *

State Rests

(The Court excused the jury until FRIDAY, July 13, 1984, 9:30 a.m., the jury being duly admonished. An instruction conference was had in chambers off the record. Court was in recess until FRIDAY, July 13, 1984. And on FRIDAY, July 13, 1984, proceedings were had in chambers as follows, with the same parties present as hereinbefore set out:)

MR. MINNICK: Your Honor, at this time, I wish to make a record with reference to the original request for a mistrial at the close of the voir dire examination. Certain arguments and references were made as to peremptory strikes made by the State. I at this time renew my objection as to any sort of inquiry as to the peremptory strikes or as to why certain peremptory strikes were made.

However, for the record, I would state that Juror No. 700, among other reasons, was struck because he has a nephew who was awaiting trial for burglary and murder. That Juror No. 816, Morris Kirkman, is

related to Ruby Bonner, a former assistant circuit attorney by marriage. I felt that his connection with a lawyer might cause him to have an adverse affect on the law or his decision in the case.

Juror No. 724, Rose Coleman, was a teacher and was also questioned relative to certain identification questions posed by counsel Ms. Phillips. The tone of her answers and the way in which she answered them indicated to me that she may have some difficulty with identification testimony.

Mr. Albert Smith, No. 662, I just didn't particularly like the way he responded to the questions and answers. He was more of a — It was more of a reaction between he and I that I felt at that time, and, perhaps, other reasons. And I don't remember exactly at this time.

No. 737, Clementine Davis, indicated that she has trouble falling asleep sometimes just from sitting. And I struck her primarily for that reason.

Juror No. 836, Shirley Lindsey, even though I stood in front of her portion of the venire panel for a good part of the trial, she never answered a single question. I felt it a little bit odd that she didn't have an answer to my questions that I produced.

Thelma Prince, No. 874, to me seemed to be agitated or a bit upset that she was here and having to listen to mine and, perhaps, other counsels' questions.

MS. PHILLIPS: Your Honor, at this point in time, I want to object.

MR. MINNICK: May I continue my record?

MS. PHILLIPS: Well, I want to object to the record you're making. I don't think your comments at this point are timely. The issue was raised two days ago—well, three days ago, really. At that point in time, you did not want to address this matter, really. And even stated that you weren't a witness, and you weren't under oath, and you weren't going to testify. At this point in time, you're going back and reconstructing events that are three days old in a kind of "defensive make it right" kind of thing, that I don't see is in any way justified. And that's my objection to this record.

THE COURT: Well, since he has gone as far as he has—and I assume he's close to the end—I'll permit him to continue. But I do think we ought to expedite it and get the jury down.

MR. LANIGAN: Your Honor, I would then like to make a few observations about the witnesses, I mean the panel members that he struck.

THE COURT: Let him finish and then you can object. But we aren't going to take much more time because I think we have got to get that jury.

MR. LANIGAN: I won't take too long.

MS. PHILLIPS [sic]: Further, Juror 705, Mamie Burnett, indicated that she was a retired nurse's aide. Something about her just didn't strike with me. The fact that she is in the nursing profession, generally, in my experience indicates some bias towards getting people a second chance, giving them a break. Likewise, as to Juror No. 766, Jo Ann Greene, who indicated she was a licensed practical nurse at City Hospital.

And Pamela Shavers, Juror No. 901, indicated that Clarence Johnson was, I believe, convicted of — not presenting doing time for drug charges — was a friend of her family. I thought that might affect her as a juror in this case.

Harvey White, likewise as the previous juror.

No. 836 Shirley Lindsay, sat back in the rear portion of the courtroom and didn't answer any of my questions or any questions at all, perhaps one question asked by Ms. Phillips.

Mr. Carl Smith appeared clearly to me had bloodshot eyes, indicating that he may have been intoxicated, even though that was not asked of him, it was my opinion.

And, lastly, Your Honor, Dorothy Ellis indicated that she was a nurses aid for the Kelly Health Care. Same reasons.

Furthermore, I continue to renew my objection to the requirement or the indication that I must show why my peremptory challenges were made.

MR. LANIGAN: Very quickly. Your Honor, I would like to point out, I would like to make a record the other way then. I am sure it will only take three minutes.

MS. PHILLIPS: And I want to as well.

THE COURT: I don't think I'm going to permit you to go through every venireman.

MR. LANIGAN: You just let the prosecutor do it.

THE COURT: He's the one that's challenged.

MS. PHILLIPS: You overrule my motion and all he has done is sit here and make a long series of self-serving statements about what he did.

THE COURT: He was challenged. So I'll permit him to do that. But you can object which you have already done to his challenge.

MS. PHILLIPS: Your Honor, what he's done is enhance the record at our expense. We do intend to challenge the Court's ruling on appeal. And the only thing we're going to have to support ourselves on appeal is the kind of record that's made here. If the Court is concerned about the time, we can go ahead and close.

THE COURT: I'm concerned about the time and relevance.

MS. PHILLIPS: And then make our record after that.

THE COURT: I'll consider it. But I don't see how what you say now would have any affect on why he made his challenges.

MS. PHILLIPS: Certainly, more information like "I struck people that are victims of armed robbery who are black."

MR. LANIGAN: And he failed to strike a white nurse as well.

THE COURT: That's already on the record.

MS. PHILLIPS: I'm not sure it's on the record. And, now, we have a very succinct statement by Mr. Minnick. We don't have a succinct whole picture in the record.

THE COURT: A record of the voir dire would indicate that.

MS. PHILLIPS: The record does not—of the voir dire does not indicate why Mr. Minnick made his strikes. He's just put that on the record.

MR. MINNICK: You have made it an issue.

MR. LANIGAN: In order for a reviewing court to determine the motivation which seems if that would have to be determined, it is important that the reviewing court have a good picture of the people who were struck. And that requires both sides of the coin, not just a portrayal by Mr. Minnick.

THE COURT: Whatever you say now will be a rehash of what was already on the record.

MS. PHILLIPS: No, I don't think so. It is true, I think, there will be additional facts that we probably did not make known to the Court clearly because of the situation at the moment. And the problem is that Mr. Minnick has had two or three days to consider this and come in and gives a nice clear clean statement which will read very well in the record at the Court of Appeals. And we have not had the same opportunity to sit down and one by one go through these people and give an answer to his.

MR. MINNICK: Oh, you haven't.

MS. PHILLIPS: No, we don't have it right now. You just were allowed to do this and we are not allowed to counter.

MR. MINNICK: Well, you are challenging what I did.

MS. PHILLIPS: Yes.

MR. MINNICK: So I have a right to defend myself even though I don't feel I need to.

MS. PHILLIPS: The ruling was in our favor, Mr. Minnick.

THE COURT: The only thing that is on the record is the prosecutor's statement as to why he did it. Everything else is on the record. What you say here is not why he did it.

Now, if you're going to say there are some additional facts or character about these people, that is on the record already and you can argue that in the Court of appeals.

MS. PHILLIPS: My problem with all of this is how clearly and succinctly it is on the record which Mr. Minnick's position now is and I'm not convinced that defense position is.

APPENDIX M

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 87-1510-C(2)

DAVID WALTON,
Petitioner,

vs.

MYRNA TRICKEY,
Respondent.

AFFIDAVIT

Comes now David M. Minnick, your affiant and states as follows.

I am David M. Minnick, an attorney licensed in the State of Missouri. I served as Assistant Circuit Attorney in the City of St. Louis, Missouri, and was serving in that capacity in July, 1984. I represented the State of Missouri in Cause No. 841-0008B, State v. David Walton.

At the trial of that cause, I conducted voir dire and exercised challenges to venire persons on behalf of the State. In order to prepare myself I consulted juror information sheets as to each venire person on the venire. At voir dire, I conducted voir dire as to each individual venire person and made notes as to their responses. Were I called to testify at an evidentiary hearing in this Court, as to my reason for exercising peremptory challenges at petitioner's criminal trial, I would use these notes and juror information sheets to refresh my recollection.

At trial I exercised peremptory challenges to remove fourteen venire persons. I moved to strike twelve venire persons for the jury and two venire persons for the alternates. Prior to the closing argument, I voluntarily asked leave of the court to make a record as to my reason to strike each person I moved struck, although I noted the law at the time did not require me to do so. I stated on the record my reasons for

moving to strike as to each person I moved to strike, with the exception of venire person Frederick Prince. I stated that I moved to strike each venire person because of the following reasons:

1) Joe Brown, because his nephew had pending criminal charges;

2) Morris Kirkman, related to an Assistant Circuit Attorney by marriage;

3) Rose Coleman, said on voir dire she would have difficulty with identification questions;

4) Albert Smith, because I did not like the way he answered my voir dire questions;

5) Clementine Davis, because she had trouble staying awake during voir dire;

6) Shirley Lindsey, because she did not answer my voir dire questions;

7) Thelma Prince, because she appeared angry at having to answer my voir dire questions;

8) Mamie Burnett, because she was a retired nurses aide, and I felt she would be sympathetic to the defendant;

9) Jo Ann Greene, because she was a nurse, who worked at City Hospital, and I felt she would be sympathetic to the defendant;

10) Pamela Shavers, because she had a friend who had been convicted of a crime;

11) Harvey White, because he did not answer my voir dire questions;

12) Carl Smith, because he appeared to be intoxicated;

13) Dorothy Ellis, because she was a nurses aide and I felt she would be sympathetic to the defendant.

I also moved to strike venire person Frederick Prince. I did not state my reasons on the record for doing so. If I were called to testify at a hearing in this Court, I would testify that I moved to strike Mr. Prince,

because he knew an Associate Circuit Judge, and he was familiar with guns.

If I were called to testify at a hearing in this Court I would testify that I did not move to strike any venire person because of racial bias. I would testify I moved to strike the above listed venire persons for the above listed reasons, among other reasons.

Further affiant saith not.

/s/ David M. Minnick
DAVID M. MINNICK

Subscribed and sworn before me this 26th day of August, 1988.

/s/ Ardith I. Hammond
NOTARY PUBLIC
(ARDITH I. HAMMOND)

My Commission Expires: 07/13/90

ORIGINAL

Supreme Court, U.S.
FILED
FEB 19 1991
OFFICE OF THE CLERK

ORIGINAL

No. 90-1231

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

PAUL CASPARI, *Superintendent, Missouri Eastern Correctional Center,* and WILLIAM L. WEBSTER, *Attorney General of the State of Missouri,*

Petitioners,

vs.

DAVID E. WALTON,

Respondent.

**BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

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ATTORNEY FOR RESPONDENT

QUESTIONS PRESENTED

I

Should this Court exercise its certiorari jurisdiction to decide an issue which could only arise in cases which became final before April 30, 1986 and, even then, only in cases in which the prosecutor voluntarily provided his reasons for striking African Americans from a venire by use of peremptory challenges?

II

Under this Court's decision in *Swain v. Alabama*, 380 U.S. 202 (1965), may a court review the reasons volunteered by a prosecutor for using all 14 of his peremptory challenges to remove every black person from the trial jury and determine that a black defendant was denied Equal Protection of Law because the asserted reasons volunteered by the prosecutor were overtly race-based?

III

Should this Court utilize this case as a vehicle for possible expansion of the rule in *Stone v. Powell*, 428 U.S. 465 (1976), limiting the scope of habeas corpus under 28 U.S.C. §2254, when Respondent was afforded no full and fair hearing of the issue in state court and when the issue involved is the overt exclusion of blacks from the jury by the state prosecutor and not a judicially created exclusionary rule?

TABLE OF CONTENTS

	Page
STATEMENT OF FACTS	1
ARGUMENT	4
I. THE FACTS GIVING RISE TO THIS CASE ARE UNIQUE AND COULD NOT POSSIBLY ARISE NOW OR IN THE FUTURE. . .	4
II. THE RESULT IN THIS CASE IS MANDATED BY THE COURT'S DECISION IN *SWAIN*.	5
III. AS THIS CASE DOES NOT INVOLVE A JUDICIALLY CREATED EXCLUSIONARY RULE, THERE IS NO BASIS TO APPLY *STONE v. POWELL* TO THE INSTANT CASE. IN ANY EVENT, SINCE RESPONDENT WAS NOT AFFORDED A FULL AND FAIR OPPORTUNITY TO LITIGATE HIS CLAIM IN STATE COURT, THIS CASE DOES NOT PRESENT AN APPROPRIATE VEHICLE FOR EXPANSION OF *STONE*.	8
A. *Stone* is Limited to Cases Involving Judicially Created Exclusionary Rules.	8
B. In any Event, Respondent was Not Afforded a Full and Fair Opportunity to Present this Issue to the State Courts of Missouri	9
CONCLUSION	10

TABLE OF AUTHORITIES

Cases **Page**

Batson v. Kentucky, 476 U.S. 79 (1986) 2, 4, 6, 7

Cardwell v. Taylor, 461 U.S. 571 (1983) 8

Edwards v. Thigpen, 682 F.Supp. 1374 (S.D. Miss. 1988) 4

Garrett v. Morris, 815 F.2d 509 (8th Cir. 1987), *cert. denied*, 484 U.S. 898 (1987) 2, 5

Hamilton v. Jones, 907 F.2d 807 (8th Cir. 1990) 4

Kimmelman v. Morrison, 477 U.S. 365 (1986) 8

Nevius v. Sumner, 852 F.2d 463 (9th Cir. 1988), *cert. denied*, 490 U.S. 1059 (1989) 6

People v. Hope, 137 Ill.2d 430, 560 N.E.2d 849 (1990) 7

Rose v. Mitchell, 443 U.S. 545 (1979) 8, 9

State v. Walton, 703 S.W.2d 540 (Mo.App. 1985) 2, 9

Stone v. Powell, 428 U.S. 465 (1976) 8-10

Swain v. Alabama, 380 U.S. 202 (1965) 2, 3, 5-7

Teague v. Lane, 489 U.S. 288 (1989) 5

Weathersby v. Morris, 708 F.2d 1493 (9th Cir. 1983), *cert. denied*, 464 U.S. 1046 (1984) 5, 6

United States Code

28 U.S.C. §2254 . . . . . 2, 4, 5, 8

No. 90-1231

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

PAUL CASPARI, *Superintendent, Missouri Eastern Correctional Center*, and WILLIAM L. WEBSTER, *Attorney General of the State of Missouri*,

Petitioners,

vs.

DAVID E. WALTON,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATEMENT OF FACTS

Respondent David E. Walton and co-defendant Sidney Hamilton are African-Americans who were charged in the state courts of Missouri with robbery, armed criminal action, and tampering. Walton was convicted following a jury trial and sentenced to 20 years imprisonment.

At the joint trial of Walton and Hamilton, the state prosecutor used all 14 of his peremptory challenges to remove every

African American from the panel which considered the case[1]. Respondent's motion for a mistrial on this basis was denied as was his motion for a new trial after the verdict was returned. However, in responding to the Respondent's objection, the prosecutor volunteered the reasons for excluding the black veniremen.

The Missouri Court of Appeals affirmed Respondent's conviction, *State v. Walton*, 703 S.W.2d 540 (Mo.App. 1985), finding that he had not sustained his burden under *Swain v. Alabama*, 380 U.S. 202 (1965) of showing systematic exclusion of blacks in "case after case." The Missouri Supreme Court denied review on February 18, 1986. Certiorari was not sought to review the conviction. On April 30, 1986 this Court decided *Batson v. Kentucky*, 476 U.S. 79 (1986) which partially overruled *Swain* and allowed for a showing of discrimination by the prosecution in striking black veniremen in a single case. Respondent moved the Missouri Court of Appeals to recall the mandate in his case, but that motion was denied without opinion in May, 1987.

Respondent then commenced this habeas corpus action under 28 U.S.C. §2254 in the United States District Court for the Eastern District of Missouri raising, on Equal Protection grounds, the exclusion of blacks by use of the prosecution's peremptory challenges. The District Court, following *Swain* and the Eighth Circuit's decision in *Garrett v. Morris*, 815 F.2d 509 (8th Cir.

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[1] One black person served as an alternate juror but was excused before the jury deliberated.

1987), *cert. denied*, 484 U.S. 898 (1987), found that the state prosecutor had eliminated African Americans from the jury on the basis of race and that the asserted reasons he volunteered for such removal were pretextual. The Court thus granted the writ, and the State appealed.

The Court of Appeals affirmed, finding that under *Swain* "once prosecutors voluntarily offer their reasons for exercising their peremptory challenges ... [the court is] compelled to effectuate *Swain's* equal protection holding by determining whether the venirepersons were excluded because of their race," (*Appendix*, A-13). The Eighth Circuit further upheld the District Court's conclusion that the reasons stated by the prosecutor for striking black veniremen were pretextual and "the prosecutor's use of peremptory challenges violated the equal protection clause" (*Id.* A-17).

The Warden filed a timely Petition for Rehearing *En Banc* which was denied by the Court of Appeals without recorded dissent (*Appendix*, A-1). The Missouri Attorney General has now petitioned this Court to review the judgment of the United States Court of Appeals for the Eighth Circuit. That Court has stayed issuance of its mandate pending disposition of this petition.

Petitioner remains incarcerated serving the sentences which have been vacated by the courts below. Additional facts, as required, will be stated in the body of this Brief.

ARGUMENT

I

THE FACTS GIVING RISE TO THIS CASE ARE UNIQUE AND COULD NOT POSSIBLY ARISE NOW OR IN THE FUTURE.

The issue raised by this petition applies only to cases in which the prosecutor volunteered the reasons for utilizing peremptory challenges for removing persons from the venire and which became final prior to this Court's April 30, 1986 decision in *Batson*. The issue raised by this case could not occur in any case which became final after April 30, 1986 or in any case before that date in which the prosecutor failed to give reasons for using peremptory challenges or did so upon order of a court, *see*, *Edwards v. Thigpen*, 682 F.Supp. 1374, 1386 (S.D. Miss. 1988).

It is possible, of course, that there are still some cases winding their way through the system which would fall within the parameters of the Eighth Circuit's decision in this case, but it is most unlikely. In fact, the case involving Sidney Hamilton, Respondent's co-defendant, did not even fall within the purview of the rule involved here because his case became final after *Batson* was decided, even though Hamilton and Respondent were convicted by exactly the same jury, *Hamilton v. Jones*, 907 F.2d 807 (8th Cir. 1990).

In short, this case is *sui generis*. The actual issues presented will have no application to anyone other than Walton. Moreover, the principles of law argued by the Petitioners are adequately dealt with in the many recent decisions of this Court concerning the scope of review under 28 U.S.C. §2254.

Respondent submits that this is not the type of case to warrant discretionary review by this Court.

II

THE RESULT IN THIS CASE IS MANDATED BY THE COURT'S DECISION IN SWAIN.

Petitioners advance a complex argument[2] for why the decision of the lower courts violated the rule established in this Court's decision in *Teague v. Lane*, 489 U.S. 288 (1989) which forbade federal courts from applying a "new rule" of law in a 2254 case. The State's position is that the decision of the Eighth Circuit in this case and in *Garrett* established a "new rule" in a habeas corpus case in violation of *Teague*. Resort to the complexities of habeas corpus law is unnecessary and inappropriate in this case because the decisions in this case, *Garrett*, and *Weathersby v. Morris*, 708 F.2d 1493 (9th Cir. 1983), *cert. denied*, 464 U.S. 1046 (1984) were directly dictated by this Court's decision in *Swain v. Alabama*. As the instant case was tried almost 20 years after the decision in *Swain*, no retroactivity question or "new rule" issue is involved in this case.

This explicit point was made by Judge McMillian, writing for the Court of Appeals in this case:

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[2] Indeed, should certiorari be granted in this case Respondent will argue that he is entitled to the application of Batson to his case.

> While *Swain* is most renowned for its now overruled holding that prosecutors are presumed to have exercised their peremptory challenges in a lawful manner, see 380 U.S. at 222-23, the Court also held, and reaffirmed, that "a State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause." Id. at 203-04 [citations omitted]... "This principle has been 'consistently and repeatedly' reaffirmed ... in numerous decisions of this Court both preceding and following *Swain*." *Batson*, 476 U.S. at 84 (footnote omitted) (quoting *Swain*, 380 U.S. at 204). Under *Swain*, a defendant can establish a prima facie case of purposeful discrimination by proving that the prosecutor used his or her peremptory challenges "to exclude blacks from the jury 'for reasons unrelated to the outcome of the particular case on trial' or to deny to blacks 'the same right and opportunity to participate in the administration of justice enjoyed by the white population.' " *Batson*, 476 U.S. at 91 (quoting Swain, 380 U.S. at 224). ... once prosecutors voluntarily offer their reasons for exercising their peremptory challenges, the presumption of lawfulness vanishes and we are compelled to effectuate *Swain's* equal protection holding by determining whether the venirepersons were excluded because of their race. *See Garrett*, 815 F.2d at 511-12. In our view, *Garrett* can be read as announcing a new rule only if *Swain's* holding that the exercise of peremptory challenges is presumptively lawful is emphasized over *Swain's* other holding that the exercise of peremptory challenges to exclude venirepersons because of their race violates the equal protection clause.

(*Appendix*, A-13-14).

The Eighth Circuit's reading of *Swain* finds support in Justice White's concurring opinion in *Batson*. Justice White, the author of the *Swain* opinion, pointed out that under *Swain* the trial judge could "invalidate peremptory challenges of blacks if the prosecutor, in response to an objection to his strikes, stated that he struck blacks because he believed they were not qualified to serve as jurors...", 476 U.S. at 101, fn. * (White, J., *concurring*).

The Ninth Circuit in *Weathersby* and *Nevius v. Sumner*, 852 F.2d 463, 467 (9th Cir. 1988), *cert. denied*, 490 U.s. 1059 (1989) and

the Illinois Supreme Court in *People v. Hope*, 137 Ill.2d 430, 478, 560 N.E.2d 849, 871 (1990) also read *Swain* to prohibit overtly race based use of peremptory challenges when the reasons for use of the peremptories were volunteered by the prosecution.

Petitioners' parsed reading of *Swain* would mean that prior to *Batson* a prosecutor could have asserted on the record that she used her peremptory challenges to remove African Americans because they were not sufficiently intelligent to serve on juries or because she believed that black persons should not be allowed to participate in the criminal justice system--and there was no constitutional recourse available to an African American defendant. As Justice White noted in *Batson*, nothing in *Swain* supports such an absurd result. "*Swain* specifically disapproved challenges that were overtly race based...despite tolerating, for the sake of honoring the peremptory-challenge system, challenges that had an unspoken racial basis, " *People v. Hope*, *id.*

The result in this case, in which the prosecutor used *every one* of his peremptory challenges to remove *every* black person from the trial jury and then asserted pretextual reasons for striking the jurors is precisely the type of specific and overtly race-based exclusion that is forbidden by *Swain*. The Court of Appeals did nothing more than apply *Swain* to a new set of facts. That result was correct. No "new rule" of law is involved in this case.

The issues pressed by Petitioners are simply not presented by this case. There is no occasion to grant the requested writ to decide such questions.

III

AS THIS CASE DOES NOT INVOLVE A JUDICIALLY CREATED EXCLUSIONARY RULE, THERE IS NO BASIS TO APPLY STONE v. POWELL TO THE INSTANT CASE. IN ANY EVENT, SINCE RESPONDENT WAS NOT AFFORDED A FULL AND FAIR OPPORTUNITY TO LITIGATE HIS CLAIM IN STATE COURT, THIS CASE DOES NOT PRESENT AN APPROPRIATE VEHICLE FOR EXPANSION OF STONE.

As has become typical in habeas corpus cases filed by state prisoners under 28 U.S.C. §2254, the Attorney General asks this Court to expand *Stone v. Powell*, 428 U.S. 465 (1976) to prohibit state prisoners from raising jury selection issues in a 2254 case. There is no basis to consider such claim in the instant case.

A. Stone is Limited to Cases Involving Judicially Created Exclusionary Rules.

This Court has repeatedly limited the scope of *Stone* to judicially created exclusionary rules. The Court said so explicitly in *Stone* itself, 428 U.S. at 469, and reiterated the limitation in a case involving discriminatory selection of a grand jury foreman (*Stone* is "carefully limited...to cases involving the judicially created exclusionary rule"), *Rose v. Mitchell*, 443 U.S. 545, 560 (1979) (*plurality decision*). Subsequently, the Court has refused to extend the *Stone* rationale to statements alleged to be involuntary, *Cardwell v. Taylor*, 461 U.S. 571, 573 (1983) and to ineffective representation of counsel for failure to file a timely motion to suppress, *Kimmelman v. Morrison*, 477 U.S. 365 (1986). In *Kimmelman* the Court made clear that unlike the judicially created exclusionary rules: "The constitutional rights of criminal defendants are granted to the innocent and the guilty alike...the scope of [the constitutional] right is [not] altered...simply because the right is asserted on federal habeas review rather than

on direct review," 477 U.S. at 380.

The exclusion of blacks from a jury is certainly not a judicially created exclusionary rule. In *Rose* this Court made clear that *Stone* would not bar claims that impugn "the fairness, and thus the legitimacy of our adversary process," 443 U.S. at 563. It would be a drastic departure from this Court's previous decisions suddenly to extend *Stone* in the manner suggested by Petitioners. There is no basis to do so.

B. In any Event, Respondent was Not Afforded a Full and Fair Opportunity to Present this issue to the State Courts of Missouri.

The basis for *Stone* was that once a state prisoner has been afforded a full and fair opportunity to present his Fourth Amendment claim in state court, he is barred from raising the question in federal court. Here, however, the Respondent was denied an opportunity to a full and fair hearing on the issue in state court. The state trial judge said that under Missouri law the prosecutor could exercise his peremptory challenges any way he desired and not be subject to judicial inquiry (*Appendix*, A-69). No actual determinations was made by the trial court other than "of [the prosecutor's] 14 strikes, all 14 were black," *id.*

Similarly, the Missouri Court of Appeals made no factual determination regarding the validity of the reasons given by the prosecutor for striking every African American from the venire. All the appellate court said on the issue is that Walton failed to show exclusion of black persons from juries "in case after case," *State v. Walton*, 703 S.W.2d at 541. No factual determination was

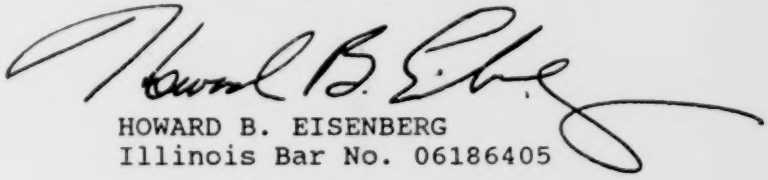
made on this point by either Missouri court considering this case.

Thus, while Respondent disagrees completely with Petitioners' general effort to expand *Stone*, this is simply an inappropriate case to make such argument. Here the factual issue was not determined in the state courts because the Missouri court refused to consider the reasons volunteered by the prosecutor for removing all of the black people from the jury. Thus even if *Stone* were extended to jury selection issues, it would not be a bar here because there was no "full and fair" opportunity to consider such issues in the state court.

CONCLUSION

For the reasons stated, David E. Walton asks this Court to deny the petition for writ of certiorari.

Respectfully submitted,



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HBE
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